Mss B
L71
1812F
v.2

YALE LAW LIBRARY



34.833

Contracts. by Mr. Reeve.

General view of the subject. A contract is an agreement entered into between two or more either to do, or not to do a particular thing. By this I would not be understood to define a valid contract, but a contract merely. Contracts are either executed or Executory. There is a wide difference between them.

When we speak of an executed contract, we mean a thing actually done, in pursuance of an agreement entered into between the parties. I think there may be an executed contract, when there has been no agreement between parties; but more of this hereafter.

An Executory Contract is an agreement entered into to do a thing, which remains to be done. E.g. J.S. agrees to sell a horse to T.N. this is an Executory Contract.

Contracts are often executed on one side only. Thus, J.S. agrees to convey a piece of Land to T.N. upon consideration of £500. to be paid by T.N. T.N. pays the money, & J.S. then refuses to convey.

An executory contract, without consideration is void; but executed contracts without consideration, are good & binding, with the exception of creditors. Thus J.S. voluntarily conveys Blackacre to B. & afterwards repents of his bargain & says there was no consideration; B. will hold it against J.S. but must yield to creditors. But if J.S. had merely promised to convey this Land to B. he would not have been bound by it.

When contracts are executed on one part only, Courts of Chancery will compel a performance on the other. E.g. J.S. agrees to convey a piece of Land to T.N. if Noakes will pay him £500. Noakes pays the money, & J.S. refuses to convey. In this case Ch. of Chancery will compel him

Contracts.

him to convey; whereas in a court of law J. N. would recover damages only & not the land. But it may be objected, this being a parol agreement is void by the Stat. of Frauds & Perjuries, which requires it to be in writing. To this it may be replied, that it is a rule of Law that where the contract is executed on the one part, or in other words that part execution of a contract takes it out of the Statute. The Cts. of Chancery, in this case, go upon the ground of Fraud in the commencement of the contract.

It is laid down, that in every contract there must be an assent either express or implied. This is correct as applied to express contracts, & in those which are implied, the law always presumes an assent.

The law points out a mans duty in certain instances, & will compel him to do it, & this rule obtains in implied contracts. It will raise a presumption of assent.

In executed conts. there is no need of assent. I am well aware that the law says there must be; but the rule that when a deed of land is executed, it vests the property in the grantee, whether he assent to it or not. This is the true ground; the title vests as well without as with assent of the grantee, & will continue until he divests it. Again, must there be an assent to implied contracts? Upon this point it is sufficient to observe, that the law will compel a man to do his duty; & for this purpose the law raises an assent in him to do it. e.g. a man is obliged to furnish his wife with necessaries; but supposing he turns her out of doors, & even forbids persons trusting her, still he will be liable to the person who furnishes her with necessaries for her support; & the reason is it is his duty to maintain her, & the law will raise or presume an assent. Once establish a mans duty & the law will ever take the liberty to enforce performance. - - -

Contracts.

Contracts may be valid, void or voidable. A void contract lays no foundation for any thing; a voidable does.- E.G. an adult, who makes a contract with an infant, is bound by it, tho' the infant is not, & avoids his contract.

In treating this subject I shall, first, consider Contracts entered into by persons wanting capacity, shew that they are void at law, and what may be avoided in Equity; Secondly, consider contracts, which are defective in themselves, so as to render performance impossible; thirdly, those, whose performance is termed physically impossible; fourthly, - those contracts, which are defective thro' mistake; fifthly, contracts entered into under particular circumstances, as duress of various kinds, which are void at law.- and even something less will avoid a contract in Chancery, as where one enters into a contract through fear, or has had some peculiar hardship imposed upon him.-

Courts of Law have long since determined, that they will not afford relief where there is fraud in the consideration of a contract but in those instances only where there is fraud practised in their execution.- There is a species of fraudulent contracts whose tendency is to cheat third persons, & which also are many times, malum in se.

In most of these cases relief must be obtained in the Court of Chancery; & the principles, which they adopt are, that they never destroy a contract, but place the parties if possible in the same situation they were, previous to their entering into the contract. They have nothing to do with punishments, & they therefore place the parties in as good a situation as they were in before. So too usurious conts. or the unlawful taking of interest, or usury as it is frequently called in the Books, are void at law; but in Cts. of Chancy. they will decree payment of what has actually been received, & retain the rest of the contract merely. E.G. A. lends B. £95. & takes a note for £100. in this

Contracts.

can Courts of Law would vitiate the whole contract, whereas in Cts of Equity, B. would be compelled to pay the £95 & make void the remaining £5.

After I have considered the nature & different kinds of contracts, I shall advert to the several kinds of actions for the enforcement of valid contracts; viz. assumpsit, debt, covenant & account; then treat of defences, which may be made to these actions, as payment, performance, tender, accord & satisfaction, award & release.

I will now consider the various Characters, whose contracts are void or voidable; then are either made so at law, or are rendered so in Equity, which I shall notice as I proceed.

The contracts of Idiots, Lunatics, & persons of non sane memory, are strictly void, tho it is contended by some that they are voidable only. Justice Blackstone is of this opinion; I think however that the current of opinion is, that they are void. See 4. Co 123. b. 2 Roll ab. 728. 3 Mod 296. 301. 2 Ld. Ray 316. Chancy. cases 113. 3 Lev. 286. Vent 298. contra 2. Bl. 291.

Though the Conts of such persons are void, yet it is held that they cannot avoid them themselves, & that no person can do this, except the Heirs or Executors of such non sane person. & the reason assigned is that no person shall be allowed to come into court & stultify himself. But I see no reason, says the Judge, why he cannot. By the ancient Com. Law he certainly could do it, for the rule objecting to this proceeding was not adopted until the reign of Edward III. Again Fitzherbert is of opinion that he might avoid his contracts, & Bl. treats the rule to the contrary as the mere caprice or whim of the Judges. Powel has given a reason in favor of the rule as it now stands, but in my opinion a very fallacious one. I shall notice it by & by. We will therefore take the rule as it now stands for granted, viz. that Idiots, non compotes &c cannot avoid their contracts, either in a court of Law or in a court of Equity; for the

the reason in both cases is the same.— It is undoubtedly important that these contracts should in many instances during the life time of the person be avoided; how then is this to be done? According to the rule we have laid down the contracting parties cannot do it, neither can the heir or Executor, for there are none. It is done in this way, a Commission of Lunacy &c is issued from the Crown, appointing two or three persons to enquire whether the person whose contract is attempted to be avoided is in fact a Lunatic &c— If they find that he is, his property from that time is in the custody of the King, and this decision of the commissioners lays foundation for a Scire facias to issue agt. the person, with whom the Lunatic, non compos, &c has contracted, to shew cause why the contract should not be set aside.— This Scire facias issues in the name of the Kings attorney; & in this way the contracts of ~~infants~~ idiots, non compotes, &c may be avoided without their coming into Court & stultifying themselves.— This proceeding lays a foundation for a bill in Chancery, & if the person be found of non sane memory &c Chancery will decree the contract void.—

There is one case directly in the teeth of the doctrine, that a person cannot stultify himself (and it is of modern date).— It was this; an action of debt was brot for certain articles, & the Defdt. came into Court & plead Lunacy; the Ct would not admit the plea, but suffered to plead non est factum under the general issue. 2 Strange 1004 or 1104.

Powells reason why a person thus situated ought not to stultify himself is, that it would have a tendency to make people feign themselves non compotes, Lunatics & the like & open a door to great fraud. I think this, says the Judge, is a very fallacious reason, for it is easily obviated by the commission of examination

examination, the result of which would determine the validity of the contract. This point is settled in Conn. Here a person may come into court, stultify himself & avoid his contract thereby. The authorities, which are found to favor the doctrine, that a person cannot stultify himself are Cro E. 398. 612. 4 Co. 123. The first case of this kind is in the year books in 5th of Edward III. As to proceeding by scire facias see 3. Atk. 170. P. Wms 105. 111. 2 Doug. 118. 2 Vern 414. Eq. cas. ab. 279.

It has always been settled law, that a lunatic or idiot must be joined in a suit brought in his behalf, for any act previous to his becoming such. Chancy cases. 153.

In Eng. if a lunatic makes a conveyance by fine or common recovery, neither he nor his heir can avoid it, & the reason is, there is such presumption that the person conveying was in his right mind at the time of conveyance as cannot be rebutted; for the court will not suffer a person to come into court & convey when he is not in his right mind. 4 Co. 124. 12 Co 124.

It may be asked if there is any relief in such case. I answer, upon principle there is none, for a court of Equity is governed by the same principles as a court of law; but the fact is they will set it aside, if the person is found a lunatic; & they go upon this ground, to wit. that of extending the principle further than a court of Law would. 2 Vern. 678. 4 12.

Upon a view of the whole then, we come to this determination, that the contracts by lunatics, persons of nonsane memory &c may be avoided in the lifetime of such persons, by a commission of lunacy & a scire facias, & after he is dead, by the Executor or Heir. There is one case, in which a difficulty of a technical nature arose. It is this, A man entered into an agreement to sell another a piece of land, the vendor afterwards became a lunatic

and

lunatic, & the question was whether the vendee could compel the vendor to convey. The case came on before Lord Hardwick, & he said there was no doubt but that the land ought to be conveyed; but the difficulty was in what manner to do it, as no person could do it for him. He said there was no way, in which it could be done; so that a specific performance could not be decreed in this case; the damages might be recovered in a court of Law. 1 Vesy 82.

But there is a case in Vesy Junr, in which the master of the Rolls said, that the vendor could not be compelled to convey, but that a decree might be made subjecting him to deliver property to the vendee without any title, i.e. if the vendee is willing to take the land without a title he may take it. 4 Ves. Jun. 685.-

There are some cases where a Court of Equity will interfere & set aside contracts, when a court of law will not, & they go upon the principle of extending the case farther than Cts. of Law will go; as in case of Drunkenness. A drunken man is often insane & unfit to make a bargain, he makes one to his disadvantage; but he will get no relief in a Ct. of Law. In this case Equity would interfere, & upon examination, finding great inadequacy, & other injury done, will set the contract aside. But if the contract appear equal, or nearly so on both sides, they will not set it aside. But if a person procures another to get drunk, with intent to get a bargain out of him, such bargain may be set aside in a court of Chancery. See Vesy 19. So if he takes undue advantage of him when he is drunk. Chancy cases 202.

Persons of weak understandings perhaps cannot avoid their contracts in a court of law, but in Chancy relief has been afforded in a variety of cases. Chancy, in these cases, it is said, proceed upon the ground of fraud but Judge K. thinks it is on the ground of a weak understanding. 3 P. Wms. 129. 199.

Contracts.

There are instances where persons understandings have been impaired by old age, or paralytic shock, tho' their understandings were originally good; in such cases when their contracts have operated strongly against them, Cts. of Chancy have given relief. 2 Ves. 184. 2 Vez. 408. 2 Atk. 324.

There is a case of this kind, a man in the possession of his right mind, made a contract which operated agt. him & it was set aside in Ch. the fact was when he made the cont. he was agitated with most distressing pain & died soon after. 6 Ves. P. C. 137. — Chancy proceeds upon the grd. that there was not a clear & perfect assent in all these cases.

Contracts of Infants.

These properly belong to the title of Parent & Child, where it is treated of at full length. I shall only note some of the general principles here, & refer you to the head of Parent & Child for a more particular account of the subject.

The general rule is that minors are not bound by their contrs. either in law or equity, but to this rule there are some exceptions. —

1st. Infants are bound by contracts for necessaries; the articles termed necessaries are food, lodging, clothing & physic; they must be necessary for him, i.e. equal to his standing in society.

By what written securities are infants bound? The general rule is, that he can bind himself by such securities, as can be enquired into by Law; & by such only. Bills of Exchange, negotiable notes, & penal bonds will not bind infants.

Infants are bound by such acts as by Law they are compelable to perform, — thus if infants make partition, if it is fairly & equally done it is binding. non secus.

Minors are of age for certain purposes. If an infant Executor gives a release it will bind him if he has received the money, secus if he has not; tho' an adult would be bound by his release, whether he received the money or not. They are capable of making

making contracts of marriage. But minority is frequently plead to avoid these contracts. But I think, says the Judge, they ought to be bound by such contracts; the law allowing them, ought to enforce them.

Chancy have in many cases established marriage settlements made by infants; but there is no rule upon this subject, resource must be had to the cases themselves. vide Parent & Child.

If a female infant takes a jointure instead of Dower it will bind her. If money is lent to an infant to purchase necessaries, it cannot be recovered back in a court of law. But in Chancy it can, in the same manner as if the lender had seen the application for necessaries.

The contracts of infants are either void or voidable. There is great confusion in the books upon this subject. I believe however says the Judge, there are very few which are strictly void.

A contract made by an infant, which gives a bare authority is void, secus, if coupled with an interest. So a power of attorney given by an infant uncoupled with an interest is void.

So in some cases the acts of infants are considered as void, in order to preserve entire the privileges secured to them. Thus where a girl sold her hair to a Barber for a mere trifle, the Ct. held this contract void, & in this way she recovered ample damages; whereas had it been voidable only, she would have recovered the true price of her hair in an action of Trover.

So under our law, if an infant sell a horse & take the persons obligation for it, & he finds the person in failing circumstances, he may go & retake the horse & consider the contract a nullity, & this is done by his privilege of infancy, i.e. to preserve that privilege. I have thus briefly considered the general nature of the contr. of infants. They are like women favorites of the law.

Contracts.

Contracts of Feme covert. vide Baron & Feme.

I shall only mention in this place, two or three general rules, & refer you to the title of Baron & Feme, where this subject is treated at large.

The general rule is, that the cont. of a Feme covert is not bind-ing upon her. There are two reasons for this, & when these reasons do not exist, I think, says the Judge, she is bound.

I. When her contracts affect any material right of the hus. they do not bind her. II. If the wife is under the coercion of the hus. her contracts do not bind her. Now when neither of these reasons exist, I take the principle to be that she is bound.

It is an established rule that a wife may hold property, both real & personal to her separate use; & it is also settled, that the separate property of the wife is liable to be taken for debt of her own contracting. i.e. she is liable for her contracts to the extent of her separate property. Execution cannot be taken out in the common form, but a bill must be filed in Chancy, and they will issue an ~~ex~~ execution to take such separate property of hers as can be found. Equity will subject her separate property. 2 Atk. 879. 2 Ves. Jun 142. Bro. Ch. C. 16. P. Chy. 318.

The hus. may convey lands to the wife in Eng. — this is done by conveying to a third person, to the use of his wife; & the Stat. of uses ofta executes the use, which puts the wife into possession. As we have no Stat. of uses in Conn. it is done by the circuitous method of conveying first to a third person who conveys it to the wife. In equity a transfer of personal property from the hus. to the wife for her separate use, is good & will bind the husband.

Contracts of Aliens.

I shall mention the law of Eng. upon this subject. It is somewhat difficult to know what our law is upon this subject. ——

It is —

It is said that an alien cannot contract. But this is not strictly true, for their contracts will pass the property from the vendor.

An alien cannot hold real property, nor personal property in real things, as leases for years. If an alien does purchase real property, it is forfeited to the public. A commission commonly issues to enquire whether an alien has purchased real property. It is made lawful for an alien friend to hire a house, garden &c. for the purpose of carrying on merchandize, & this Stat. has also been construed in practice to mechanics. If an alien purchase real property it is not in the power of any person to commit trespass upon it, or claim that he is not the owner, until process is taken to ascertain the fact. The heirs of an alien, cannot inherit an estate which he has purchased.

An alien friend may make any contract respecting personal property, so may an alien enemy; but the latter cannot enforce his contracts during the war, i.e. not till hostilities have ceased. Formerly a contract of insurance could be enforced by an alien enemy, during a time of hostility, but the law is now altered.
Co Litt. 2. Sid 309. Lane 87. 2 Show. 135. 3 Mod. 94. 3 Salk 29. 7 Com. 17. 6 T. R. 23. 35.

In Eng. outlaws, persons excommunicate, felons & traitors, cannot enforce a contract in a court of justice, still they may be said, tho they cannot sue. Co Litt. 128. Com. dig. 10. No law of this kind in Conn.

I have thus far considered contracts, where the defect has been in the contracting parties. I shall now consider the doctrine of

Assent.

Assent is said to be either express or implied, i.e. tacit. Express assent sufficiently defines itself; as to implied assent it is said that in cases where there is no express assent, the law raises an implied one. This may be true in many cases, & in many it is false; for oftentimes a man is compelled by law to do a thing, to which he expressly dissents

dissents. State the true ground, says the Judge, to be this. that the right to recover does not really go on the ground of any assent, but upon the ground that it is a mans duty to be made liable. Find what a mans duty is & the law will make him promise, & also make him liable whether he assents or not. So when a man turns his wife out of doors & she provides herself with necessaries at his expense; in this case his duty to furnish her will make him liable, even tho' he forbade every one from trusting her on his account. -

Suppose A. mortgages a piece of land to B. & again in the presence of B. he mortgages it to C. a court of equity would decree C. to be the first mortgagee, because B. being present hearing the cont. but says nothing, by his silence affords a presumption that he did in fact assent to it. But this is not certain. 2 Ves. 151. 2 Atk. 393. -

Again, A. leases B. a piece of ground, & again leases it to C. in the presence of B. who tells C. it is a good lease & says nothing about his own prior lease. Equity will decree that C. shall hold it on the ground of B's assent. Powel, C. 131. 2 Vern. 229. -

There should be a certain knowledge in these cases, the mere fact of being a witness is not sufficient. 2 Ves. 6. Bro. Ch. 357. -

Again, suppose money is extorted by duress, you may recover it back by action of assumpsit; now here is no promise of repayment, but it is the duty of the person to pay it back, & the law raises an implied promise so to do. -

Again, it is said that in all cases of grantees, there is an assent - true indeed in all cases of express contracts. But in many cases there is not the semblance of it. E.G. Suppose a grant made to an infant three hours old, will any pretend that he assents? The truth is it vests without any assent & will so remain, unless some act of dissent is manifested. - It is -

It is said that there are contracts, out of which others from the necessity of the thing must arise; thus suppose you hire a chamber i.e. make a contract for a chamber; it is said that the person hiring the chamber also contracted for the use of the staircase, which is necessary for the enjoyment of the room. Judge R. thinks this is a part & parcel of the same contract, & not two distinct ones.

Next with respect to ignorance or error in invalidating the assent. We are now to consider cases, which are distinct of all fraud or wrong. In some of these cases, equity will rescind the contract, in others the party may have damages in a court of law, notwithstanding the cont. is enforced. — In all these cases where there is a doubtful or uncertain right as to both parties, this secures the cont. & is good; it a bargain of hazard. — See 2 P. Wms. 726. Ath. 58. Cowp. 37.

Relief may be had in equity where assent has been given under a misrepresentation of one's right. Thus, where a person gave his daughter £10,000 legacy, telling her she might take this sum or take her orphanage share after a rejustment of his accounts. She supposed she was obliged to make an election, & consequently chose the legacy. — But it proved her orphanage share was £40,000, She petitioned Chancy for relief & they decreed & gave her the £40,000, proceeding upon the ground that she gave her assent, through a mistake of her right. 3 P. Wms. 316. —

So again a person may have relief when he enters into a cont. not understanding his own legal rights. The Schoolmasters case, so called, is a good illustration of this principle. A. B & C. three brothers; B. dies, and A. the eldest & C. the youngest were at a loss, who should inherit their Fathers Estate. — Not coming to any determination themselves, they applied to a schoolmaster in the neighborhood, who was supposed to know everything; he said it all went to the

the youngest. Afterwards the eldest discovered that the whole estate belonged to him according to law. He petitioned Chancery and they gave relief. It is to be remembered in this case that the brothers made an equal division.

It is a general rule when a person mistakes the law, he can have no relief, for every person is bound to know the law. But this is not true in all cases, which I will point out as I proceed.

The general rule upon this subject is, that when there is a mistake on both sides, the contract will be wholly invalid or set aside. i.e. if the contract is such an one as would not have been made by the parties, if certain circumstances had been known to them; & it turns out contrary to what they supposed at the time of contracting. The case of the Salt Spring will well illustrate this this rule. — viz. A purchases a piece of land of B. both supposing there to be a salt spring upon it; this was the great inducement to the purchase. It turned out that there was no salt spring, here both were mistaken, & the contract agreeably to the rule we have now laid down was set aside. —

Again, where a man bought land under the impression that it was not titheable when in fact it was. Powell Contr. Chap 2nd.

If a person sells an article & represents it to be sound, when in fact it is not, an action will lie for the fraud, & the soundness of the price is frequently evidence of the soundness of the article, i.e. where a sound price is given for an article, it is evidence that the article also was considered sound. —

But we will consider a case, in which there is no fraud. John Stiles sells to Tom. Stokes a horse; Stokes pays a sound price for the horse; The horse in the hands of Stokes proves, proves to be unsound; but this was not known to Stiles when he sold the horse; —

quere

quere, can an action of fraud be maintained against Stiles? Most clearly not, it has been doubted by many whether any action at all can be supported by Stokes. But, says the Judge, if you adopt the rule I have laid down, it would seem clear that Stokes might maintain, & that relief might be had by an action on the case for damages. You can not go to Chancy in cases of this kind, for this is a contract executed, the horse is delivered & the money paid & received. Chancy interferes only in executory contracts where the contract is about personal property, & in contracts both executed & executory when about real property. Also if we reason from analogy, we shall find that an action in such case ought to be supported, for we know that when money has been paid & the consideration fails upon which it was paid it can be recovered back in an action of indeb. assumpt. for money had and received. There is no reason then why an action on the case should not lie in the former instance for damages. The reason is as strong in that as in the latter case. A man ought not part with that which is valuable in exchange for that which is not valuable. Powell lays down the rule in this way without any qualification, but cites no authority. — P. 6. 150. — —

As to contracts which are defective in themselves. We suppose in these contracts, that there is no defect in the parties to the contract, no want of assent & no Error. — —

Under this head will be considered impossible or illegal conts. These contracts are not binding upon the parties, carrying their own destruction along with them. — —

By impossible here, is meant any thing impossible to be done, rerum natura; or physically impossible as it is frequently called. & not that kind of impossibility, which we ascribe to those persons who are unable to pay their debts. Thus in saying a bankrupt can't

pay

pay his debts, we mean something different from this: as if a man should contract to go to Rome in 24 hours; & in all such cases where money has been paid it can be recovered back again.—

Suppose J. S. covenants with J. N. that he will convey him a piece of land by such a day; the time arrives, he is unable to convey because Richard Roe, the man of whom he expected to buy refuses to sell this land. Now this is a good contract in law & J. N. may maintain an action & recover damages out of J. S. for breach of covenant. Chancy cannot enforce a specific performance in this case; but if J. S. himself had been the reason why the contract could not have been carried into execution, they would have laid him under a penalty, & this penalty exceeds the damages which might have been recovered at law. 1 Bro. P. C. 117.

There are two cases to this point, one called the rye corn case, but this the Judge thinks was a species of fraud instead of impossible contract. See 2 Ld Ray. 1164.

The other is the one commonly called the barley corn case; it was this, a person agreed to sell his horse & the purchaser was to give him a barley corn for the first nail in the shoe, & so on doubling it for every nail. The court in deciding this case, introduced a novel principle; for they directed the jury to give the plff £8.0.0. on that contract, this being found to be the value of the horse. Now there is no case previous to this, that where the court gave any thing, they did not give to the amount of the contract. In this case they made the owner take the 8£ & the buyer give the same sum, when there was no contract between them either to take or give it. There was no agreement in this case as to the 8£, for this was not contemplated in the contract, & whether this was an impossible contract was not agitated. 3 Wood. 305.

= There is

There is a rule as respects bonds with conditions; viz. if a condition becomes impossible to be performed, either by the act of God, or act of law, or by the act of the party himself in whose favor it was to be performed, it does not vitiate the cont.— it is still good if it is a contract executed; but if the condition is annexed to an executory contract, the party contracting is not bound. — — — — Examples — — — — —

J. S. conveys a piece of land to T. N. & a condition is inserted in the deed to this effect — viz. that if J. S. goes to London & transacts certain business & returns by such a time this conveyance is to be void. J. S. dies in London, — now the question is, whether the contract is destroyed? Agreeably to the rule we have laid down, certainly not; it was the act of God which prevented a performance of the condition; the contract was executed, the land vested in N. by deed*

But if the contract had remained executory, if the deed had not been actually given, this contract would not have been good, i.e. the party would not have been bound. This will appear from the very definition of an executory contract. —

Again, A arrests the body of B. — B. gives a bond conditioned for his appearance at the next court, B. dies previous to the sitting of the Ct. in such case B. is discharged from his bond. —

So if B. gives a bond to A that he will marry C. by such a time, & A marries C. himself. Now B. is discharged, for by the act of A. he is prevented from performing the condition. Co Litt. 206.

I will now advert to a branch of this subject, the principle of which, tho it is settled law I am inclined to doubt. It is this — if a bond be given, with a condition impossible to be performed at the time of entering into the contract; the bond shall be good & the condition only void. E.G. (Sills) Suppose the condition of a bond was, that B. should travel 100 miles in an hour, in this case the Court would say, that

* Subject to the correction of this observation. T. R.

that the condition was void, but the contract good. I doubt this principle, says the Judge, - for suppose he had covenanted to do this, now it is settled that such covenant is void; & I consider the bond, in this case, only a mode of covenanting, & that it ought to be void, tho' the law is, as I have stated. The principle is not applied to contracts which are unlawful. In such case the bond & condition are both void. Thus a bond conditioned to murder a third person is void as well as the condition. - Plow. 32.

But there is a case decided by Lord Holt, in which a distinction is made; it is this - if the consideration of the bond is mentioned in the bond itself, the bond is void - Thus it runs that the rule we have before laid down is applicable to those cases only, where the condition is a separate thing, & can be severed from the bond & the bond remain good. - Ld. Ch. 172. - - - -

Contracts to do Unlawful acts.

If a man contracts to do an unlawful act, the contract is void. But it will be asked can you enquire into the consideration of sealed instruments? I answer, says the Judge, you always may enquire into its illegality. Res turpitudo may be pleaded both in Law & Equity -

A contract to pay for committing an unlawful act is void & can never bind the party. No difference as to this point, whether it is malum prohibitum or malum in se.

So contracts against sound policy, or contra bonos mores are void, tho this opens a wide door to Courts to determine what things are and what not against sound policy &c.

A contract that a man will not a particular trade is void as being agt. sound policy - So if a man contracts that if he does not pay money by a certain day he will go to Jail, this is void also. So a contract which has a tendency to promote a incest

breach of the law, or a tendency to prevent that from being done, which the law requires should be done, is void. So a wager that J. S. can flog J. N. is void for this tends to a breach of the peace. So an indemnifying bond to save a printer harmless, if he will publish a libel is void. - So all contracts, which have a fraudulent object in view are void. - - -

a contract destroys that contract, & the receiving too much subjects the party to a penalty.-

If a person both reserves more & recieves more than legal interest, the contract is void, & he is subjected to the stat penalty beside.-

Thus, a man lends $90. & takes a note for 100 $, here is too much reserved, consequently the bond or note is void.- But he goes farther & recieves interest when the note becomes due, as interest economize, in this case there is an unlawful reciving of interest, & he thus subjects himself to the penalties of the Statute.-

A means taking unlawful interest, when a person comes and pays it to him, is not conclusive evidence that there was an original contract to receive more than the legal interest; & it has now become an established rule, that a persons receiving unlawful interest, furnishes no evidence, that there was an original usurious contract. No subsequent corrupt contract can effect an original good one.-

There has been a dispute whether the taking a premium for the loan of money is reserving or receiving too much. The Judge thinks it is the former, & consequently annuls the contract. The reason he gives is this, that there is no difference between receiving the premium first, or receiving it on the contract.-

This taking the premium may also subject the person to the penalties of the Stat.- for it may be the means of receiving too much eventually, by taking full interest at the settlement.-

Case of this kind in Con. A went to B. to borrow a sum of money. B. will lend it, but says he must have 12 p. ct. int.- A takes the money & the question was whether this parol agreement for unlawful int, there being no written security in the case, made it an usurious contract. The court decided that it was.- I was-

- counsel.

counsel in the case; & I wrote to Justice Buller he gave it as his opinion that the contract was usurious.

No matter how many securities are given, if they relate to an original usurious contract. Authorities however say, that usurious money may be recovered back, when the original contract was good, but the usury taken on a parol agreement.

If in a fair loan of money, there is an agreement to pay yearly interest, this is not an usurious contract apparently or in fact. Still you cannot in such case recover more than the principle & interest, tho if the interest had been paid, it can not be recovered back again. This is founded upon policy, in order to guard men against their own carelessness and indiscretion.

So again if the contract was originally fair, & no compound interest reserved, & it runs on 3 or 4 years, if then the borrower pays compound interest, the lender is not guilty of usury, because he takes no more than he would have gotten, provided he had received his interest annually, as he ought to have done; even if a note had been given at the end of 4 years for the first sum & the compound interest till then, there is no usury in this. But you cannot compell borrowers to pay more than the legal rate of interest.

When a man takes a note to be paid at the end of one year, the holder gets only lawful interest. But if the note is to be paid in six months, if then the interest be paid in six months, the holder gets more than lawful interest. He gets the interest for six months on the first interest; but the law allows of this, it is not usury.

To oblige a man to pay interest monthly, on purpose to make him pay more than lawful interest is usurious, i.e. will be deemed usurious by the law. In time however it became a rule which commenced in Banks that it was immaterial & not usurious;

that

that Lawful interest may be taken any time in the year is now well established.—

This reserving too much may be done in a variety of ways. it may be by reserving interest when the note is given, & taking it again when the note is paid; or it may be done by taking property of the borrower at a less price than its real value; & when the article bought or sold is connected or communicates with the loan in this case there is usury.

Contracts where there are hazards run are entitled to more than usual interest. The hazard must be a legal & real one, not colored & made to evade the Stat.. Any contract when the hazard extends to both principle & interest is not an usurious one in law. ——— Annuities. ———

Where a man loans a sum of money to receive upon it more than legal interest, while he lives, but upon the termination of life to lose the principal, it is annuity. No interest is paid until the expiration of one year on a contract of this kind, & tho it may be very exorbitant it is not usurious. ——— ———

Bottomry Bonds. ———

When a person lets another have money, who is going a voyage on condition that if the ship does not return at all, then nothing to be paid, but if she does return, then an exorbitant interest or sum shall be paid— this bond is called a bottomry bond & is not usurious. ——— Cattle loaned. ———

The loan of cattle to double once in three or four years, as the case may be, is a frequent practice in Con.. This contract is void if the cattle die. Now all the premium taken in this way is exorbitant, still it is not considered as usurious.—

Where there is a real hazard run the contract is not usurious.

But

But how shall we determine when real hazard exists? - A lends B. 100$ is to receive 12 per cent provided B. does not die in a week; but if he dies then he recives no interest. Now provided B. was in apparent good health at the time of the contract or loan, it will be deemed a colourable hazard merely. - Again A. lends B. 100$ at 20 per cent, to receive so much interest provided 8 of B's children dont die in the space of four years, it is usurious - there is no hazard run, or at least a very improbable one. - Secus, if the proviso had extended to but one of B's children. - the hazard in that case might have been considerable. - -

Suppose a man should borrow 100$ & give a bond for 200$ to be paid provided he does not discharge the 100$ by a particular time, this is not usury for he can discharge it at the time. -

Whenever there is an opportunity to free oneself from over it - ant interest, there is no usury, unless there is a private corrupt a - greement to let that opportunity pass by. - Parol evidence may be introduced to prove these things, & if by mistake not intention the contract is usurious, or an usurious premium is taken, it is not criminal if the mistake can be proved. -

The mode of casting interest is different in different pla - ces, & often different in the same place. There has been a rule estab - lished by the Superior Court of Conn. & since adopted by the Supe - rior Court of the United States. - for this rule see Swifts System. - -

Suppose you cast interest according to custom, e.g. as the custom of some merchants in the City of N. York, - quere - if more than legal interest is taken is it usurious? It is said not, for there is no corrupt agreement between them. - There has been no rule laid down in the books for casting interest. It has been said that pa - rol proof is admissible to prove usury. - - - -

Usurious

Usurious contracts may be purged. where a man gives a note, & then gives a new one afterwards (the first note having been transfered to a third person) to the third person. Here it is purged of its usury, and this does not go up on the ground that a new note is given merely, - but on the ground of removing prejudice from third persons. Thus A. executes an usurious note to B. - B. sells the note to C. - now if A executes a new note to C. the contract is good as between A. & C. - but the original note as between A. & B. is still usurious.

If two notes, entirely distinct from each other, were taken, one of which was usurious, afterwards a new security is given for the whole it is good for nothing. But the original contracts will remain, State you according to a manuscript case, & according to the Judges opinion.-

It was long believed that usurious money could not be recovered back. This idea prevailed until Lord Talbots time. the reason given why it should not be recovered back was that the Plff & Deft were pari delicto. Where the parties are equally culpable no relief ought to be given. But in gaming for instance they will let the looser recover back his money, because they suppose him cheated & overreached & therefore not in pari delicto. - So in usury the person lending breaks the law, yet both are not equally guilty in law. - the borrower is many times necessitated to borrow or suffer distress & therefore not so culpable. - But notwithstanding the inequality of guilt in borrower & lender, notwithstanding they are in pari delicto it is an established rule that usurious money may be recovered back in all cases. -

When an old contract was usurious & a new one was made throwing out all the usury, the Judge (in his charge) the Case, not, was usurious cont.

This has been decided both ways. See Hamplins Reports. where there is an usurious contract a collateral security would be void.

Powers of Chancery over Usurious Contracts.

Courts of Chancery excuse no person on the ground of his having entered into an usurious contract, because Courts of Law have competent jurisdiction as to that. Cts. of equity never set aside any part of an usurious contract, but the surplus; they only interfere in case of hardship, & that in trust, which is more than legal they relieve against.

Why then do you go to Chancery at all? Because in Law you cannot make proof. But in Chancery you can compel the usurer himself to give evidence, i.e. by being himself put under oath, & the bill filed against him or his non appearance, will be taken pro confesso. & they will proceed to set aside the surplus interest, or the oppressive part of the contract.

We have a Stat. in Comm. which strikes out all the interest where there is usury, & the principal alone is recovered; but a bill must be filed immediately for this purpose or failure of proof at Law, & Chancery will expunge all the interest both legal & illegal, & decree a recovery of the principal only.

In pleading you must set forth the usury, specially, as at common law; tho where there is a general Stat. as that of usury you need not plead it specially, for Courts are bound to take notice of general Statutes. —

Nor assumpsit may be given in Evidence under the general issue, therefore when you would avoid an usurious contract under hand & seal, you must spread it upon the record & plead it specially. The same method is of course pursued in assumpsit.

In a plea the word corrupt & some particular must be inserted, tho the plea is good if stated larger than appears in proof. —

Suppose A contracts with B. & A. is guilty of usury, while B. is ignorant of it, & the agreement was not corrupt. The Ct. would say here is no usury in the plff according to the Stat. It takes two to make a bargain & it takes two to make it corrupt. — v

Quere. can a new trial be granted if a person fail of making proof of usury on the first trial? & afterwards finds more evidence? No, for the law says where a man has been in danger of a penalty & on trial he was clear'd, he shall not be put in jeopardy again even tho' the most conclusive evidence of his guilt be offered, unless the proof was kept back by the Offender. The penalty of usury is intended as a punishment upon the usurer.

All illegal instruments not negotiable when they pass, pass with all their turpitude or illegality.

Expectation of a large interest, voluntarily given, does not make the contract usurious. —

A contract made in a place, where 7 per cent is the lawful interest, it will carry 7 per cent interest (in a place where any other rate is the legal rate, i.e. it will in Con.) & if a bond is given to secure that contract where 6 per cent is the legal rate of int. this bond is good if 7 per cent is received upon it, the bond being given to secure a good & bona fide contract.

A merchant in Con. makes a contract in Con. with a Merchant from N. York & agrees to give him 7 per cent & the payment is to be made in N. York; on the same principle this is not usurious, if the bond & goods were to be paid for here & any deception has been discovered it would be otherwise.

The Lex loci where the intention & presumption is that it will be performed, will & must govern as a general rule. A contract, whose performance is lawful in one country, but malum in se, & contrary to good morals in another will not be enforced in the

— latter. —

latter. But if it militated merely against a positive regulation of the latter country they would enforce it. The law of usury stands upon this ground, it being a positive institution or law here, therefore if more than 6 per cent is taken the law is broken. But if the contract is to be performed bona fide in N. York where 7 per cent may be taken, the Eng. Cts will suffer you to recover 7 per cent. I will now cite authorities in support of the above principles, & first to elucidate the points of reserving & receiving too much interest, the former making the contract void & the latter subjecting to a penalty. see 1st Aug. 223. 1st Eaz. 2 Wils. 250. 2 B. & R. 794. Cro C. 20. Sand. 294. 2 Moo 307.

Whether the loan was partial or in toto goods or money, or the goods connected to conceal the usury, see 1 Moor 398.

All securities, whether of a real or personal nature, are void when relating to an usurious contract. Cro J. 508. 3. 80.

Payment of int. made any time in the year is not usurious now, tho it formerly was if made before end of the year. Cro J. 26. 2 Sha. 1243. 3 Bulst. 17.

To see the difference between a bargain & loan, vide Atk 301. Whe the principle & interest are in real hazard & not colourably so, there is no usury in taking more than legal int. Moor 397. 5 Co 70. Cro J. 508. 253. Cro C. 642. 741. Cro J. 209. Carth 53. 5 Co. 69. 2 Burr. 704. 2 Laws 8. 1 Vesy 164 3 Wils. 390. important.

That there must be a corrupt agreement & that a mistake does not create usury, see Cro J. 677. 2 Vent. 83. Cro C. 501.

Where a corrupt security is sold & the buyer is ignorant of the corruption it is still void in his hands unless it be a negotiable instrument. Cro J. 33. 14 Liv. 43. Cro C. 642.

No penalty which a man inflicts upon himself for the non payment of money at the time is usurious at C. Law. Bank. 2458. Cro J. 509.

Contracts.

But Statutes are of the contrary to this principle, as when a note contains such conditions, & when there corruption in the penalty of any instrument. Gaming contracts are void to all intents & purposes, even when negotiable & in fact negotiated. Raym. Ann. 1005. 55. 4 Burr. 713.

Expectations of a voluntary gratuity do not render the contract usurious. See Hawkins 248.

That usurious money may be recovered back both in law and Chancery now, tho not formerly, see Talbots cases 38. Bromley v. Smith. Bay 670. Comyns 791.

That you may get rid of usury by pleading it specially, except in indeb. assump. see Term. 4. 98. 4 Lev. 208. Wils 206. 2 Lev. 7. Andr. 124. 2 B. R. 861. Comyns 112. 770. 93. 793. 42. 7. 2 Burr. 715. 5 Dr. 2082.

Lex loci governs; not much to be found in Books, but anal agous cases may be seen. 2 Burr. 1077.

All contracts malum in se are void; & all considerations of such contracts are void, any & every thing about & concerning them is are void.; & if money be paid for the performance of such contract it may be recovered back before the performance of the condition.

Many things are unlawful, which are agt. the welfare of the Commonwealth, & are void. Gaming Contr. by English and U. States Statutes are void. In Eng. however if money is lent for the purpose of gaming, it may be recovered. The security in such case is void but the cont. is good. But in Con. money lent for the purpose of gambling can seldom be recovered back, & the Judge thinks this to be the law in most of the States.

Contracts to pay gambling debts are void by the Com. law. The security & the contract are two different things; & it is a general rule that where the security is void the old contract revives. So that a man, in Eng. when the security is made void

may

may bring an action on the original contract. Analagous to this is the law for an annuity, which must be in money or it is void; therefore if I pay part money & part goods I cannot recover the annuity because that is void according to law. But I can recover on a quantum valebit. The old contract is revived. 5 R. 132. Pow. 68.

A question may arise, where there are no Stats. agt. gambling, whether gambling Conts. are not void at Com. law, as being against sound policy, being a mere waste of time. - Money fairly won at play can't in Eng. be recovered back again, but if there is an action the Judge thinks it can & also that Conts. of gaming are void at C. law.

Fraud will destroy a Cont. in any shape, - Selling a pretended title is also void - these titles are those of land generally. -

So if one man is out of possession claiming title, & one is in also claiming title, the one out of possession can't sell the land - whether he has the real title or not - for if he has the real title let him eject the one in possession before he conveys. This is void at C. law, tho the penalty is added by Stat. Hen. VIII. The covenant too would be void for the sale is void to all intents & purposes. - 5th Rep. 88. - The States in general have a similar Stat. -

Where a contract lawful to be performed at the time entered into, but becomes unlawful by an act of the Legislature, the person ones is discharged, & if money has been paid, it can be recovered back.

Contracts not to follow a particular profession or trade are void as against good policy; but contracts not to exercise these particular trades or professions in a particular place are good. Co. Lit. 206. Powel. 166. Cro. J. 596. Palm. 172. -

If this contract is put in writing & sealed, to wit not to exercise a trade in a particular place, the presumption is that

it was made without consideration void, tho here you may enquire into the consideration given, contrary to the gen. rule in this subject, to wit. that written securities under seal cannot be enquired into. - 2 Str. 1. 39. P. W. 181. 192 Atkyns 115. 262. -

And such contracts are not unlawful when entered into with a penalty. The gen. rule is that Chancy will relieve against the penalty. But if the penalty is in the nature of ascertained damages the Cts. of Chancy will not afford relief, otherwise they will relieve against it, diminishing it to the real damages sustained.

In Com. v. Mass. the courts will Chancer down a bond given for a direct act, & in Com. when given as above for a collateral act, a court of law will here relieve as well as a Ct of Chy. tho not in all cases where Chancy will. Hard. 83. Martin v Huntington Vs Stanley. Brown Chy. - -

Again, where a person contracts to uphold another in a law suit, i.e. carrying it on, it is void as being v. the good of the commonwealth, - exception in the case of Parent & Child. Son in Eq. if an officer takes bar obligation for his fees it is void as it tends to extortion. Uncertain how the law is, as to this in Com. 10 Mod 159. P. W. 195. -

So also a bond entered into by a prisoner to pay his board while in prison is void - so also if he binds himself to remain a prisoner after the debt is discharged. This obligation is void. It has been so decided in Conn. Plow. b. 10 b. 100.

Contracts entered into with an alien enemy are void as against sound policy. -

There are some cases in which Cts. of law have not afforded relief, & Cts of Chancy have, tho Chancy have adopted no new principle

principle, but by extending the same.—

Marriage brokage bonds. These are void in Chancy, tho. of law will not relieve against them. They are bonds, given by persons desirous of bringing about a match, to pay so much provided they will exert their influence, & the party succeeds; i.e. if the marriage is accomplished. Such bond or contract is void as being detrimental to the public. And any contract to effect such purpose is considered in the same light as a Bond. 1 Chancy R. 86. Show. P.C. 76. & when money has actually been paid a recovery of the sum has been decreed. Equ. Cas. Ab. 2 Vern. 588. 1 Dr. 451.—

Again, there is another class of cases, which are decided on the same ground of policy; it is that of contracts with young heirs for their expectancies. Such contracts are void. They are not set aside on the ground of infancy, but that of policy; but Courts of Law refuse to declare these conts void. Vern. 75. 2 Dr. 14. P.W. 310.

If these conts. have been executed Chancy will decree, or reinstate them in their expectancies on the usual grounds, i.e. if the person supposed he was obliged to convey his expectancy; & it is a case in which Chancy relieves when a person is ignorant of his legal rights, altho it is said that ignorance of the law no excuse at. 3 P.W.s 292. note 394.—

So where a person paid the expectancy voluntarily, & was not chastised with a suit, still Chancy will grant relief, because he was ignorant of his rights.—

But if the cont. is fair & is carried into effect with full science on both sides, Chancy will not set it aside, tho they would have destroyed it before its execution.— 2 Vern. 159.

A promise to indemnify a person in the commission of an unlawful act is not binding.— Cro. C. 208 or 268.—

But

But if a person does an unlawful act, not knowing it to be such at the time of its commission, he may recover on the bond of indemnity, for he is liable to damages. —

So where a person arrested another without legal process & delivered him to an Innkeeper for safe custody, with a promise to indemnify him agt. all loss, the Innkeeper turned the key upon him, & was afterwards sued for false imprisonment, as it clearly was & suffered damages — the Ct. allowed him to recover upon the promise of indemnity, because he was ignorant of the unlawful process, by which he was arrested. Hutt. 53.

So if the plff give an officer a bond of indemnity, who is about to attach the goods of Deft. but is doubtful whether they belong to the debtor or not, such bond is good. So a promise to indemnify the Officer is good. Cro. J. 252. Plow 69.

Again, all contracts to evade the law are void. So a wager with a Judge of Ct. by plff or Deft. that he will lose his case is void. Cow. 39. —

So again all contracts, which have a fraudulent object or view are void; as when an Auctioneer employed a person to bid for him, in order to take the goods from the bona fide bidder. Willis vs Baldin in Day. —

So all contracts which have a tendency to make a person do that, or induce him to do that, which the law makes it his duty to perform are void. Thus where a Deb. Shff contracted with a High Sheriff not to serve writs above the value of £20. this was void, for it was his duty as D. Shff to serve all writs, which came to him. Mor. 856. —

So again contracts which induce a man to break the law are void. ——— ——— ——— ———

But a —

But a bond taken by a Shff to let a prisoner have the liberty of the prison yard, is good; tho it is taken to prevent a negligent escape as it is termed, but actually is not, for the person may escape, when there is no negligence on the part of the Shff.

A contract which wantonly affects the feelings of third persons is void both in Law & equity. Comyns 2 Dig. 735.

If a contract is made, which afterwards becomes unlawful by a Stat. all obligation is discharged, & if the consideration has been paid it must be refunded.

But Chancy says if the contract is of such a nature that part of it may be performed, & the party in whose favor it is to be performed is willing to accept part performance, Chancy will decree it to be done. So when a contract for a lease was made for 90 years & afterwards a Stat was made for bidding leases to be made for more than 40 years, in this case Lepu was willing to accept a lease for 40 years, & Chancy accordingly decreed it. 2 Eq. Cas. ab. 26. but this case was reversed in the House of Lords. — Bro Chancy. —

There are other cases in which Courts of Chancy have afforded relief, & some which are void at law, — a case of this kind, A gives his bond to B. in consideration of which B. was to use his influence to get C. to convey his Estate to A. — B did use his influence & C. actually conveyed his property to A. B called upon A. to pay this bond, & A got his petition in Chancy & have it set aside, & it was set aside, & upon the same ground as marriage brokage bonds. vide 276.

Contracts in restraint of marriage are void. Some are void in Law & some in Equity only.

A contract not to marry at all is void both in Law & Equity, for it is a grand & improper restraint. Contra bonds among

A contract not to marry any except a particular person is void. So if A enters into a contract with B. that he will marry no other person except herself, & if he does he will give her so much as damages: it would seem A might pay the damage & at liberty to marry some other person. But Chancy does not view it thus; it will deem it void, & it is also void in Law. — 4 Bacon 2225.

Again a contract which obliges one to marry & imposes no obligation on the other is void in Equity but not in Law, & it is void for want of reciprocity between the parties. Doubtful. 2 Vir. 215. 102. —

There is a case in 4 Vin's, which is said to be opposed to the idea. But even here we find a reciprocal obligation on the other party, it is also reported in 2 Cast cases. 248. But the doctrine I have laid down is confirmed by Lord Hardwick in 2 Atk 540 & 10 Vin's 429. which sets the point beyond dispute.

The reason why such contracts are binding in Law is that a bond to marry under seal carries consideration with it, but they notwithstanding the solemnity of the instrument will enquire into the consideration. But a promise merely in this case void. not bind at Law any more than in Equity, because the consideration may be enquired into. —

Contracts to procure offices for others are void; & if the money is paid it may be recovered back again. 2 Atk. 140. 3 P. W. 391. 1 Bro Chy. 164. 4 Vin's Law. 811. —

There is one exception to this, namely that of offices in the army & navy of England, i.e. that it is lawful for one to procure an office for another, & the reason why it is allowed it is said is because it is matter of convenience. P. Chy. 199. Vin. 98. H. BC. 327. —

But no officer will be permitted to take the place of another officer. 2 Vin's. 308. H. BC. 322. — So where a Captain sold his

commission

commission of an East India man to his Lieutenant. this was void. 8 T. R. 90.

Lord Thurlow says these contracts are void in Law as well as Equity. 3 Bro Chy 759. —

Contracts entered into with Kept mistresses —
If these contracts are entered into for future cohabitation they are void. 3. Bunn. 1508. 9 Ves. 294. —

Quere, whether a bond or other contract entered into to pay for past cohabitation is good? The distinction taken is this, that if the bond was given to a prostitute it is good for nothing. But if to one, whom the Obligor has seduced, it is considered as the price of her modesty & binding; this is the Old doctrine. see 2 Atk 333. 638. Ver 483. 2 Vern 187. 242. —

These bonds however in modern times, are considered as voluntary bonds, & it makes no difference whether they are given to a prostitute or to a virtuous woman, ie one who was virtuous before being seduced. — Lord Camden was the first who advanced this opinion & modern cases have adopted the same idea. 1 Ves. & Bs. Jurs. 291. 286. 2 P. Wms 432. Talb. 158. Bee. in Chy. 119 Com. 742. —

~~That~~. A question has been made whether past cohabitation was a consideration. The fact is it is no consideration at all — a past cohabitation being inserted in the bond does not destroy it. 2 Wils. 339. 2 Ver 242. 7. —

There are cases, in which such a bond might be set aside, but they proceed upon other grounds. Thus a young woman lived in the family of a married man, he seduced her & afterwards gave her a bond, — Now this bond was set aside, & says Lord Hard. this is a case in which the woman knew she could not marry the man, & this makes a difference from the other cases. 2 Ves. 100.

Another case was where a woman married a man, who had

had another wife, but she was ignorant of the fact; she afterwards discovered the fact but continued to live with him, & he gave her a bond, the question was, whether she could enforce the payment. The court said that she could not; But also said if she had left the man as soon as she discovered he had another wife, she might have enforced it. 3 P. Wms 339. —

The Chancellors in Eng. have lately been reluctant in meddling with many of those contracts, such as Marriage brokage bonds &c. for they think they may be avoided at law. 3 Brs. Ju. 368. 5 Bro 224. 7 Co. 19.

Idle Contracts.

A contract may be so idle that no action can be maintained upon it — E.G. a contract to give a man £5. if he will wash himself, is idle & void. —

Consideration of a Contract.

A contract may be defective for want of a consideration.

The general rule is, that a consideration is absolutely necessary to every Executory contract. The quantum of the consideration is not considered, but there must be some, if it is only a pepper corn, or no action can be maintained. 2 Bl. 1442. Pow 330.

As to Executed contracts the general rule is, that they are good between the parties & there can be no releasing them. 3 Ac. 238. Doug. 20. Esp. 577. Stra 955. —

But there is a rule, that if the Grantor makes a deed of real property without consideration it enures to the use of the grantor only; as if a man for the consideration of love and affection should convey a piece of land to a person no way related to him; now here is no consideration, & this is said to enure to the grantor only. Now I can see no reason in this says the Judge i.e. why a distinction should be made between real & personal property

property, for suppose a bill of sale of a horse was given; in this case the grantee would hold the horse.-

The rule I apprehend was introduced into Eng. during the civil wars. I think it has no application in this country. In the time of those wars, it was customary for persons to convey their lands to their use: this being a common thing, it began to be presumed that where a person conveyed property, without consideration, that he conveyed it to his own use; & this was the origin of the rule, and afterwards the Statute of uses, vested the legal title in the cestuy que use; so that a man could not convey away his land, when he conveyed it to his own use. Now I believe the true rule, to be this; that executed contracts whether of real or personal property vest the title in the Grantee. It is the rule adopted in this country.

In Executory Contracts there must be a consideration. See Com. 330. 5. Salk 129. Plow 302. Dyer 30. 336. Ex nudo pacto actio non oritur. 2d Ray. 909. Com. 326. 5 T. R. 143. - If the contract is parol & there is no consideration, demur to it. -

Suppose the contract is in writing & the promisor acknowledges a consideration, this is a good contract.-

Suppose the written contract itself mentions the consideration, this is good & no parol proof will be admitted to contradict it, even tho' it could be proved in fact that there was no consideration, for the instrument speaks for itself.

But suppose the consideration in such case & the written contract is in point of law no consideration, in such case the contract is not binding. -

Suppose a man promises to do a thing, & no consideration mentioned in it; now this is not good, upon the face of it, but in such case you may aver one in your declaration, for there might have been -

Contracts.

bun a consideration, which was omitted in the writing; averring one in the declaration does not contradict the writing, & therefore does not affect the foregoing rule; & it is also a general rule that you may always make an averment of a fact, which will stand well with instrument; tho you may not aver one, which will destroy it.

But suppose the written cont. is a sealed instrument, and no consideration is expressed in it, is such contract good? Yes, and no averment of consideration is necessary, for the sealing implies a consideration, & affords a presumption that there was a consideration, as no man would be likely to perform so solemn an act as signing & sealing without a consideration.

There is a difference between a right of recovery, when the agreement is to do some collateral act, & when it is to pay a sum of money.

Whenever your action is such as sounds in Damages, the quantum of consideration may be inquired into, but you cannot negate the consideration, & this is permitted in order to ascertain how much damage was or shall done.

But if a bond or covenant was given to pay a sum of money, & there is no other consideration, now the precise sum mentioned in the bond or covenant will be recovered & no damages. This distinction is owing to the form of action; for the action to recover this sum of money is the action of debt, in which damages are not uncertain; & also in the action of debt you must recover the whole amt. stated in the declaration or nothing.

Suppose in this bond or covenant, a consideration has been alleged & disclosed, which consideration in point of law is no consideration; question — can there be a recovery? It depends upon this, if the sealing merely is a consideration, there

can

can be a recovery; but if the sealing is mere evidence of a considera-tion, a recovery cannot be had.--

But the seal does not presume any consideration but what is expressed in the instrument, & if proved that the one therein assigned, in point of law, is good for nothing; therefore the seal is good for nothing is no consideration, & there can be no recovery in such case.-- -- -- -- --

A consideration may be either valuable or good. A good consideration is not good against creditors. A conveyance for a good consideration does not stand upon the same ground as a voluntary conveyance; for Chancy will not decree an execution of a voluntary conveyance. But they will in many cases, where the conveyance is for a good consideration, as where it is to provide for children & relations.--

Under the English law, written agreements without seal, are of no higher authority than parol agreements, except in the cases of negotiated instruments. The words for "value received" in an instrument are sufficient evidence of a consideration, upon which to ground an action.--

What is a Consideration?

There is no perfect definition of this, the following is perhaps as good as one as you will find, viz, If there is an advantage to the promisor or this is a consideration, also if there is a disadvantage or inconvenience to the promisee, this also is a consideration.--

If the consideration is meant to be an advantage & in fact it proves not to be so in point of law, although may be a disadvantage to the other party, yet it does not follow that the contract is good. Suppose one in consideration that

another will beg his pardon, should engage to release a note
or obligation, which he held agt. him — now this will not bind,
& no action can be maintained upon it, for it is no considera-
tion in point of law; to beg a mans pardon is mere wind, it is
not valuable altho it may be considerable disadvantage for
one to beg another's pardon. — And it is on this ground that an a-
ward, to beg a mans pardon, by arbitrators, is not good in law
& no action can be maintained upon such an award. Ro. E. 67. pl. 1. Ro. A. 258. pl. 2. 278 pm.

Past considerations are not binding. — Thus when one has done an act,
& in consideration thereof, another promises to pay him something there-
for. Suppose B. finds C. in gaol & gives bail for him; afterwards
B. meets A. tells him what he has done, & A promises B. that he
will reward him for it, & indemnify him agt. any consequen-
ces, which may follow on it; now this is a past or executed con-
sideration, & agreeably to the old decisions is not binding.

Again B. tells A. that C. was about bringing a suit agt.
him A. & he, B. paid the debt in order to prevent it; now sup-
pose A promises B. to repay him, according to old decisions B can
not maintain an action of indeb. assump. agt. A. — for the con-
sideration of this promise of repayment is past, & the rule that
a past consideration was not binding was universal.

Man cannot support an action agt. another, for
a mere voluntary courtesy done him, even tho afterwards
he promises to pay for it. —

But of late some doubt has arisen upon this subject,
some alteration of opinion has taken place, & it is said that in
a case of voluntary courtesy, of a benefit accruing to the per-
son, for whom it was performed, an action upon an express prom-
ise of repayment may be maintained. Cases of this kind have been
decided. —

decided, viz. a farmer employd a number of men to reap his field for him, & while they were at work a person came along and wanted to be hired but the owner was not in the field, he went into the field & worked all day, & at night informed the owner what he had done, who promised to pay him for his days work; he however afterwards refused to pay it, saying the consideration of the promise was past; upon this he brot his action & recovered upon the promise.

There has been a decision in Conn. accordant with the foregoing case & the modern rule; it was the case of the Town of Plymouth, which voted to give Soldiers £40. for enlisting after they had enlisted, & after they had given them a previous sum for that purpose. authorities to the old rule. Dyer 272. 2 Cro. E. 467. Esp. ni. 87. 95. 2 Cro. 6. 409. 3 Salk. 96. -

I have no authorities for the new rule there are some no doubt. in the late reporters. ...

There are cases, which seem nothing more than voluntary courtesies, still they lay the foundation for an action, & what are they? They are those cases where a man is bound to perform an act, & another performs it under such circumstances that humanity renders it a moral duty for him to perform it; the mere circumstance of duty in such case is not sufficient; you must take in the idea of humanity, which renders it a duty in foro conscientiæ. Thus J. S. turns his wife out of doors, & T. S. furnishes her with necessaries; he can recover from J. S. for it is not merely a duty for J. S. to maintain his wife in this case, but humanity requires of J. S. that he should furnish her. 2 Lev. Cro. E. 138. Roll R. 413.

Altho the consideration be past, yet if it is done at the request of another, i.e. in consequence of a previous request, it is good.

Contracts.

Thus if B. request B. to give bail for C. & he does it, & afterwards A promises to pay B. this is binding. Pow. 351. Vent 268. 3 Salk. 96. Cro E. 409. Cp. 95.

Another proposition is, that a prior moral obligation upon a man to do a thing is always sufficient to raise a promise & such consideration will bind. Thus a promise to pay a debt which is barred by the Stat. of limitations, or contracted during minority. —

But if there was no moral obligation, the promise to pay the debt of another, he being under no obligation to pay is not binding. So when a woman promised to pay the debt of her son, this promise was not binding, she was under no obligation to make the promise, i.e. no moral obligation. —

Suppose a married woman should give a bond, & after her husband's death should promise to pay, still she is not bound by this promise. But suppose an infant had given his bond in like manner & after he came of age promised payment, he would be obliged; & the reason of this distinction is, that a bond of a feme covert is absolutely void, whereas that of an infant is not, but voidable only; & no promise can revive contracts void ab initio, but it can a voidable one. —

But it does not follow from this, that there can be no moral obligation to pay this bond, & in this case the married woman altho her original contract was void, still if a promise afterwards is made & there was a prior moral obligation to pay, I think, says the Judge, this would be ground for recovery. —

I am well aware that the old void contract cannot be revived in this case, still I do think, that where there was a prior moral obligation, & a subsequent promise, this promise will =

will support an action; & I therefore think that the proposition laid down in the case of the married woman, is too broad. Str. 964.

Can any person under any circumstances have the benefit of a promise made between two other persons. Thus suppose J.S. should promise T. N. that he would give his son Sam N. 100£ - when he became of age. Now can Tom's son Sam sue J.S. upon that promise? We suppose that there is a consideration in this case; there are cases in the Books, where persons for whose benefit promises have been made, have been allowed to maintain their action. It is said there must be a relationship in order to maintain, & that this relationship is the ground. But I think, says the Judge, it is on the ground of absolute necessity, & that it can be done in such cases only when there is no other person who can sue; & if we examine those cases, which have been decided upon this subject, we shall find that necessity, absolute necessity governs. -

The first case was this, A man having a son & daughter, & wishing to give his land to his son, and also to make provision for his daughter, he devised his land to his son, & at the same time devised Timber then growing on the land, to the amt. of £1000 to his daughter - But the son disliking to have the timber cut off the premises, promises the Father if in case he will alter his devise, & give him the timber, he will pay his Sister £1000, & she send him in her own name on the promise to her Father & recovered. This was from the necessity of the thing. -

We are told in the books, that this action if maintainable at all is confined to the promise made, & that it cannot be brot. on a bond. But if I have stated the true principle, it

it makes no difference whether it is a promise or a bond; it is true. there is no case in the books where a bond has been given.-

There was a case decided in the national Ct. in the case of a bond. the Ct. decided on the ground of necessity. it was this- Ira Allen gave a bond to Heman Allen that he would convey certain lands in Vermont to Heman's daughter when she came of age. The land was conveyed to Heman, that is in trust for his daughter, & the fact was that Heman died & Ira was his Executor, & thereby came into possession of the bond &c & he then refused to convey to the daughter. She having an exact copy of the bond brot her action in her own name & recovered against him.-

It was once employed as Counsel, says the Judge, in a case of this kind, tho it never came before the court. A man made a promise to the Father of a boy, that if he would let his son come & live with him, he would give the boy a Yoke of oxen. The boy went & lived his time out, & his Father refused to sue for the oxen. Quere, could the boy sue? Vent 6.318. 32.8 Mod. 117. 3 P.Wms 35. Burr. 2680. Esp. Dig. 576. 1 Bells. 35.-

Consideration of forbearance to sue.-

There have been many actions brot. on considerations of forbearance to sue. Suppose J.S. has a bond agt. T.S. and T.S. promises on consideration that J.S. will forbear suing him for six months he will pay the debt.- now the bond is not affected by this promise, but remains good. Suppose that he should promise that if J.S. would forbear to sue a book debt for 6 months, & within that time it happens to be barred by the Stat. of limitations.- Now in such J.S. would recover the whole debt on such promise, & in all cases whatever damage a man has sustained by not suing, that damage he will recover.- - - -

This forbearance must either be forever or for some limited time, for a promise to forbear merely without specifying any time is no consideration whatsoever. It is nudo pacto. Case of this kind,

B. had arrested upon a void process. A goes to B. promising him if he will let B go he (A) will pay him. Query, is A bound by this promise? no he is not, but he would have been had the process been good. Cro. E. 20 b. Cutlon 108. Cro. E. 9. 1555. Esp. di. 95.

A promise by one to do a thing is a sufficient consideration for one then to do a thing; thus if A should promise B. that he would pay him L5. if he would promise to deliver him a cow, now this does not affect the performance, & B may sue A for the 5l. before he delivers the Cow, because, if he was to deliver the cow first, and in these cases, when one promise is the consideration of another promise both parties must be bound or neither. Twine this principle as too broad, says the Judge; for a voidable promise is a good consideration always; but if it is void on one side, it is on the other.

Again, suppose A should promise to pay $50. or 5% deliver nine 50 bushels wheat; now A is under no kind of obligation till B delivers the wheat & A can sue B. for the wheat. He that undertakes the first act, must perform it or he is liable, & the other party is not liable till the act is performed. Therefore in the case put of the wheat, B must aver that he has delivered the wheat, & A need only avow that the wheat was not delivered.

But if any thing is stated in the contract, whereby it appears that the money was to be paid first, it must be done. Suppose a man agrees to give $50. for 250 bushels of wheat; it has been settled that in such case the wheat must be delivered first; & if you can learn by the agreement, that one was

to act first, that must be done before the other party is liable.

But if there is a promise in consideration of another promise, or a promise, in consideration of an act to be performed, & you cannot determine which was to be done first, both being concurrent, the contract is of no validity till one of the parties performs his act; thus in case of a mutual covenant, between A. & B. - A says he in consideration that B. has agreed to convey him a piece of land next June, I agree to give him $500. & B covenants to the same effect on his side; now in this case you cannot determine which act was to be done first; both are concurrent, & this contract is of no validity at all, & binds neither party, till the other has performed his part. -

Thus it appears there are three classes of cases as it respects the right of action & the performance of contract. 1st - Where the promise of one is the consideration of a promise, or an act to be performed either party may sue for the performance. - 2nd. - Where an act is to be done first, this act must be performed in order to entitle the person to an action. 3rdly. Where the acts are concurrent, as in the case of mutual covenants for example, and you can't determine, which is to be performed first, yet there can be no recovery, till performance by one, i.e. till one has performed his act & avers it. Vent 117. 214. Hobt. 88. Hard 102. Salk 24 Pow. 363. - And in the case last mentioned, equity will not assist either party, unless he has performed what he stipulated. -

A compromise of a doubtful right, is always consideration sufficient to bind the party. 2 Vern. 234. Atk. 152.

It is not necessary that the consideration be expressed in direct terms in the contract. Pow. C. 368. - -

In express contracts no consideration can be implied, only the one, which is expressed. 7 Co. 4 or 7 or 9. —

If—

Contracts.

If in fact there has been no consideration at all for money paid, as a general rule, an action of indeb. assump. will lie to recover it back again.-

Again, if the consideration intended by the parties fails, if that consideration was the sine qua non of the contract, the contract may be set aside in Chancy; but if it is not the sine qua non the contract stands, & the compensation if any there be will sound in damages.-

If the consideration is a promise impossible to be done, no obligation arises on the party to perform it. If the contract is illegal no right of action can accrue.-

But if money has been paid for the performance of an illegal contract it is different; for in some cases it can be recovered back, in others it cannot. When the parties are pari delicto money so paid cannot be recovered back; but if they are not pari delicto it can. E.G.- Suppose two persons are engaged in smuggling goods, & money has been paid; here it cannot be recovered back, for both are in pari delicto; but suppose usury has been taken, on this case it may, for the borrower is not equally guilty with the lender.-

There is a strange proposition, which has been handed down to us, but which is now overthrown, viz, that so long as an illegal contract remains executory, if money has been paid it may be recovered back again. This has been law for some time past; but according to the late Reports of Cook & Campbell it is decided that money paid in such case, cannot be recovered back again, any more than if the contract had been executed 1 Barn 1012. Cowp 290.-

A new question came up on this subject. A & B. merchants in

in Company, enter into an illegal contract with C. C. performs
ex his part of the agreement, & A paid the whole sum for the per-
formance of this unlawful contract; the question was, could A.
recover half the sum which he had paid C. from B. his Co-part-
ner. The Court have made a rule upon this subject, & say that
A cannot recover from B. unless he was privy to the payment
by B. & did not dissent to it. 3 T. R. 418.

Want of consideration if you can get at it will destroy
a contract. If a quitclaim deed is given & is a bargain & haz-
ard. no money can be recovered back again.

Suppose there is fraud in the consideration, i.e. A
makes B. believe that he has gotten a consideration, when
in fact he has none; now in such case you can only recover
damages at law, & the contract will remain; but if the con-
tract is respecting land Chancy will set it aside.

But if there is fraud in the execution of a contract,
it is void, & non est factum; thus suppose a contract is made
with a blind man, & it turns out different from what was
stipulated it is void. Eg. a note of hand is drawn for him to
sign, & the sum read to him is $5. whereas the note & purports
$10. it is void, there is fraud in the execution.

There is a famous case in 2 Wilson, Collins v. Blanton
which shews that you may plead the illegality of a contract
& spread it upon the record.

There is one case, where it seems that the Court treated
the contract as void, tho the fraud was in the considera-
tion. In Conv. fraud in the consideration may be pleaded
Law as in other cases, & you may also go to Chy if no suit has
been commenced at law. It must all be sheer fraud; that

fraud =

fraud will not be permitted to be plead, at Law, in Conn.

There are contracts which ought not to have their full effect, by reason of something external, and this is when fraud or force is practised by either party. Some of these contracts run against a person by are recovered, while others may be set aside in equity. I shall notice this as I proceed.

By force I mean not only duress, properly so called, but all cases where a person labors under some imposed hardship. And under fraud I shall consider a great variety of cases, where undue advantage is taken of a mans situation.

There are four clases of Frauds.

1. Actual imposition. 2. When fraud is apparent from the intrinsic nature & subject of the contract. 3. When an undue advantage is taken of the circumstances & situation of the contracting party. 4. The fraud practised upon third persons.

1. Actual imposition. What this is will be considered hereafter, I shall here consider the remedy that is to be had, where this kind of fraud is practised.

The remedy is sometimes in Law, & sometimes in Equity, & in some cases the remedy is in Law only. Where there is actual fraud in the execution of a contract, the remedy is complete at law; the contract is absolutely void. E.g. Where a man executes a contract & supposes in fact he is executing one of a different nature. So where a man signs a note of $500 when he supposed he had signed one of but $50, this is void, & sued, the fraud may be plead; but suppose it is not put in suit, the obligor may go to a court of Chancery to have it set aside, & the Ct. will decree that such bond or note be delivered up or cancelled.

Parol testimony may always be introduced to prove fraud in

in a Contract, & the rule that parol testimony shall never be introduced to destroy a written contract does not apply; for it is introduced here to shew that no such contract was ever made for in point of law it never was.-

The legal idea of fraud is to destroy it & get it out of existence. Thus when a person with fraudulent intent procures a quantity of silk stockings to be brought to him, & he took them - here the fraud destroyed the bailment & blotted out the delivery of them.-

Where there is a direct fraud in the consideration of a contract, if it is a personal one it is not void. By the common law of Eng. the remedy or compensation is in damages. Thus A sells B a horse & represents him to be sound & he proves otherwise, B cannot compel A to take the horse again & give him his money; but he must sue for damages.- And the rule is the same in Eng. if it is a total fraud, e.g. paying a counterfeit bill for a horse.-

But in Conn. notwithstanding it is a personal contract if there is a sheer total fraud in the consideration it is void & the general issue may be pleaded & the fraud given evidence under it.-

But a partial fraud respecting personal property is considered here as in Eng. & the remedy is in damages. But I think however, says the Judge, that contracts respecting personal property ought to be void, as well as those which respect real property. The experiment has been made but ~~I~~ it failed.- The case was this - A exchanged horses with B & gave £20 for his bargain; B's horse afterwards in the hands of A proved unsound, & he sent & tendered him to B & took an action of Trover for his former horse, & an action for money had and received -

received for his money. But both actions failed. Weston v. Downing, in Compton's Dig.

If this fraud is in real contracts you may either recover damages at law, or you may apply to Chy & have the cont. rescinded.

Therefore if there is fraud in the execution of a contract it is void; but if it is in the consid. it is not void but it is a personal or real contract. If it is total or partial fraud in personal conts you recover damages - if in real conts you may have it rescinded in Equity. In rescinding a real cont. the parties are placed in the same situation as before contracting.

What is this fraud? There have been a revolution of opinions upon this subject, what was in former times considered as no fraud, is now considered as such. Grotius, Puffendorf & other moral writers insisted that the vendor of an article ought to acquaint the vendee, with all the defects of the thing sold, and that if he did not it was fraud. Now there are some old authorities, which are contrary to this doctrine. But modern authorities agree with those writers, I say that the vendor ought to disclose all defects, and that a suppression of the truth is as great a fraud, as a direct falsehood.

But if the vendor knew of no defect, then is no fraud, this I suppose, says the Judge, that an action would lie, against the vendor on the ground of mistake. To maintain an action of fraud you must state & scienter & prove it; for if you cannot prove that the vendor knew of the defects you cannot maintain this action.

Suppose the defects are visible, & there is nothing said about them at the time of purchase? In this case there is no fraud for the vendee is supposed to have noticed them. But if there is any industry used to conceal those open defects an action lies, and if it is real property that is the subject of the contract, it may be

be rescinded. As to patent or open defects, see Bro. Chy 460.

Expressions of opinion merely, even tho made with an intention of fraud, are not such as will support an action. But a false affirmation as to some facts is fraud sufficient to support an action. Thus suppose T. N. should want to hire a house of J. S. & asked for how much he rented his house, J. S. says for £80. when in fact he got only £40. This is fraud. But if he had said the rent was worth £80. it would not have been fraud, for it amounted to mere matter of opinion. Cro. J. 4. Roll ab. 101. 4 Mod. 20. Sid. 146. 3 Salk. 383.

A question of this kind has arisen. J. S. told T. N. he had rented his house for £50 per year, when in fact he had rented it for £40. T. N. makes some inquiry & concludes to give £50. Holt said that an action of fraud would not lie in such case. But it has since been determined that it makes no difference whether T. N. made any inquiry or not, & that an action would lie for the fraud. Lord Ray. 1118. Salk. 211.

It has been made a question whether a person in no way interested could be made liable for a false affirmation, & which was the procuring cause of the contract, by which a man sustained an injury. But it is now settled that such person is liable for such false affirmation. Thus if J. S. was about to make a bargain with T. N. & should enquire of J. W. as to the character of T. N. & he should affirm that T. N. was responsable when in fact he was not, in this case J. W. would be liable if J. S. should sustain an injury in consequence of what J. W. had said. 3. T. R. 51. So also if he affirms a thing of which he is entirely ignorant the rule is the same. East. 38. B. & R. 36. 10 Ves. Jr. 470.

So also, says the Judge, I conceive it to be settled that no person can make a false affirmation, respecting any fact, without

being liable, in case any person is injured by such affirmation.

But the law will not take notice of a false affirmation of the fact, if the fact is such as can be known by both parties without any difficulty; as if a man should affirm that his his horse or another had four legs, when he have but three, & he was present before the purchaser so that he could not be deceived. - - - -

But Equity will not enforce any contract, where any the least industry has been employed to conceal defects. E.G. Suppose one should sell another an article at a distance, which if he had seen he would not have purchased on account of some defect. now an action will lie, in such case for any fraud practised, & all these cases proceed on the ground of industrious concealment. As to latent defects. The rule is they must be discovered or declared, if they are known to the party & he does not disclose them, an action will lie against him. It is suppressio veri. Perhaps there may be cases, when latent defects may be concealed, & yet no action will lie in such case; as when the purchaser had as good means of information as the vendor himself. Peake C. 115. 5 Veg. J. 598.

In the above case it is necessary you state, that the party, who concealed the defect, knew of its existence.

A question has been made in modern times, whether a latent benefit in an article sold, ought to be made known by the purchaser to the vendor, supposing the latter ignorant of it, while the former knew it. Quere, Is the purchaser liable for not disclosing this benefit? It has been decided that he is not bound to disclose it. 2 Bro. Ch. J. 420. -

There is a case decided in the Books, previous to the one above, this in some respect different. It was this - A person having

having discovered a mine upon a tract of land communicated the knowledge to a third person; this person dissuaded the discoverer from purchasing, & articled with the owner, for the purchase himself. But the owner afterwards becoming engaged with the circumstances refused to convey; upon this he made application to Chy to have the conveyance enforced. but Chy refused upon the ground that the discoverer of the mine might have given more for it. 2 Atk. 371.

The rule as to discovering defects has been narrowed when applied to the sale of real property, & the reason assigned is, that from the very nature of the property, deception can be practised. The Court of Errors in Con. have gone so far as to say there can be no fraud in the sale of land by applying the rule Caveat Emptor. This maxim, says the Jud, may be carried too far.

If the purchaser has the means of knowing, or being acquainted with the situation of the property, & is deceived, I think he can have no remedy; that an action will not lie. But not so with respect to personal property, for the vendor is bound to disclose defects, notwithstanding the purchaser is present & has an opportunity of knowing; & the distinction seems to be this; that it is the duty of the purchaser to be more particular in the purchase of real property, that he should exert himself more to acquire the truth, than in the case of personal property. 2 Ves. 307. 6 Ves Jr. 678. 10 Ves. 505.

Suppose a man sell a farm for 500 acres, when upon admeasurement there appears but 400. now in this case no action will lie agt. vendor, for the vendee might have ascertained the fact by measuring, & it was his duty so to have done before he bought it.

So if he tells him there is so much woodland & so much meadow, when in fact there is not as much, still no action lies - for the purchaser might have ascertained those facts antecedent to purchasing.

There is a case in the Books, which seems to oppose this doctrine, but in fact does not. - The case was this; a man wishing to purchase a farm, the vendor gave him a description of one, which was false, & the vendee bought the land, & the court gave him relief; why? agreeably to the rule we have laid down he should have gone & examined the land. - this is true. But in this case the unfavorableness of the season rendered it impossible for him to form a correct opinion about it, & that was the ground, on which the Court decided, & what was required in ordinary cases, was in this instance dispensed with. 5 Ves. 508. -

There is a manuscript case of this kind, a person bo't a house of another & the vendor said the house was sound. But it appeared that some timbers, which were not visible were rotten & unsound. The purchaser brot an action agt. him & the court said the action would not lie, upon the ground however that the damage was small & of a trifling nature. But I suppose, says the Judge, they would have sustained an action, provided the damage had been great, i.e. if the purchaser had sustained material injury; for in this case he could not ascertain whether the timber was sound or not unless he had pulled down the house. another case, see Bro. Ab. 440.

There has been a great question agitated in this & the neighboring States, whether this rule applies to the wild lands in the western country, which are usually sold without having ever been seen. The question is, whether the vendor is

liable if falsely represent the quantity or quality of the land?. Our courts have always decided that he was, & that caveat emptor does not apply in this case. But the former Court of Errors reversed the judgt. in every instance. I am clearly of the opinion says the Judge, that they ought to be liable, & the reason I give is, that the lands are at such a distance, the purchaser cannot without much expense, go & view the land; and in most of the States the rule in such case is, that an action will lie.

There may be fraud in other things. A man is always liable to an action of fraud for a breach of trust which a man is bound to perform, & if there is no express agreement the law will imply one; thus a man employs an Attz to manage his case, and when it is to be tried the Attz is absent, whereby the pltff is non-suited, now the Attz is liable. Rollab. 91. 11 Co 99. 2 Saund. 312. Cro. J. 469.

It would seem from the current of authorities, that minors are not liable for their frauds, but it is opposed to all principle says the Judge. I conceive that they ought to be liable for their frauds, as well as their torts, but the law is otherwise. contra 5 Cid 183.

Actions of fraud may be maintained when there has not been a word spoken but the fraud was accomplished by actions, thus where a man blackballed the head of his negro, who was grey, & made him appear some sprightly airs, for the purpose of making him appear like a young man an action was sustained.

In cases where there is a warranty, actions of fraud will lie, notwithstanding the warranty, tho this seems some what strange, yet it may be done for it is an established rule that where there was a design to dispose of the article by warranty, action of fraud in such case is concurrent with an action on the warranty. Roll ab. 96. Cid. 146.

Contracts.

Warranty. Warranty must be made at the time the contract is made, accus, it is of no effect; for if it is made afterwards, there is no consideration. Thus where a person warrants that the hilt of a sword, which he offered for sale, was silver, the person to whom the offer was made did not buy it at that time; the afterwards offered it but without warranty, the person bought it, & it proving not to be silver he brot an action on the first warranty, but it was held not to lie. But an action of fraud in such case would lie. Stra. 414. Eyr. 76. Salk 211.

The next are those cases of fraud where it is apparent from the intrinsic nature & subject of the contract; & also, where the particular situation & circumstances of the contracting parties, will prevent their contracts from being carried into execution).

Such contracts as these cannot be defended at law, application must be made to Chy for relief, & even tho if these contracts have been executed, they will not set them aside unless something strikingly unjust appears. They will not enforce any such contracts if the least unfairness appears about them. So it requires something more to rescind a cont. than to prevent one from being carried into execution.

There are many things which are evidence of fraud or unfairness, which must be learnd from the cases themselves. Inadequacy of price is evidence of fraud or unfairness, & if it is connected with other circumstances may be conclusive to set aside a contract; tho it is said inadequacy of price alone is not sufficient. But I think I shall be able to shew that it is also sufficient to set aside a contract. It is certainly evidence of fraud as taking advantage of a mans peculiar situation, & upon this ground

ground contracts, may be set aside in Equity. case of this kind —

A man takes a mortgage of a piece of land for the security of a debt, & in the mortgage there is a covenant that the mortgagor shall pay the interest annually, & if he does not, then interest upon the interest shall be allowed. Now this is not usury, but it is considered as an unreasonable contract & Chy will relieve agt. it so far as they can, i.e. they will suffer only principal & interest to be recovered. Talbot C. 41. 2 Salk 449. —

Again, a case of this kind. A young man had a legacy left him to a large amount; he was afterwards confined in Newgate for some crime, & while there he sold his legacy for a trifling sum; he afterwards obtained his liberty & applied to Chy for relief; the Ct. decreed he might have his legacy upon the ground that undue advantage had been taken of his situation. 3. P. Wms 290. 1 Dr. 300 or 310. — and I suppose, says the Judge, if he had not been imprisoned & had sold his legacy for so trifling a sum, that even in that case Chy would have rescinded the contract on the ground of inadequacy of price; that appearing evidence of some fraud, or undue advantage having been practised upon him. Wilson 230. 2 Vs. 518. —

Another case, A. & B. were indebted to C. — C sued them and recovered judgment & they were unable to pay the money. C told them if they would give him their farms, he would discharge the debt, & give them the overplus or residue, to which they agreed and afterwards they repented & applied to Chy for relief, & Chy rescinded the contract. Ver. 465. —

Again A. was in distress & indebted to B. C. pretended to be a great friend to A. & promised to assist him, which he did by furnishing him with money at different times. At length C.

proposed to A that he would pay all his debts, provided he would give him all his property, to which A assented; but afterwards repenting of his bargain he applied to Chy & they rescinded the contract on the ground that C took advantage of A's situation; & in this case Lord Thurlow says inadequacy of price alone is sufficient evidence to set aside a contract, & this opinion has since been followed up Hatchet Vs Pay, in Bro Chy. Bro Chy 9. 2 Ves. 195. 3 Burn. 402. - - -

fraud practised upon third persons, i.e. upon the other creditors. - 2 Ves. 602. 3 P.W. 93. Ves. 240. 475. Now it is to be observed respecting those contracts, which defraud third persons that they cannot be affirmed. Whereas in Conts. in which one of the parties is defrauded he may affirm the contract notwithstanding. But in these it cannot because it cheats third persons. 3 P.W.s 496. 2 Ves. 764 or 704.

If these conts. are assigned for a valuable consideration, still they are subject to the same equity in the hands of the assignee as they were in the hands of the assignor; & if there was any fraud while in the hands of the assignor it remains still while in the hands of the assignee, i.e. the assignment does not purge the fraud.

There is another species of fraud upon third persons, to wit, a conveyance of the marital rights of another.

These contracts take place in the instances of Females, who having concluded a marriage treaty, convey away their property without the intended husbands knowledge; this is a fraud upon the husband & void. But if he is knowing to the fact he cannot recover it back. 2 Chy. C. 42.

It is admitted, however, that if a widow, who is about to be married to a second husband conveys away her property to make provision for her Children by her former husband it is a good conveyance. 1 or 2 Ves. 408. 2 P.W. 357. 744. 2 Ves. 17 or 19. -

It has however been determined that if there has been any misrepresentations by the widow in such case, as if she had said, she had made no conveyance, nor ever would make any, the husbands right in such case shall not be defeated. the conveyance will be void. - 1 Ves Jr. Vesy 26. 2 P.W. 532. 675. 2 Browns Chancery 345. - - -

Contracts.

Fraudulent Conveyances.

This subject is very important. I have devoted much time to it, says the Judge, & believe I have sifted the cases so much that I shall be able to state to you the doctrine correctly.

Fraudulent conveyances, or the law upon this subject, is derived principally from the construction of the Statute of 13 & 27 Eliz. both regulating fraudulent conveyances; & I believe this Stat. has been copied in most of the States, & the same construction has been given by our courts, as by the English courts.

Conveyances might have been fraudulent at common law without any Stat. & I shall hereafter mention what the common law was, respecting conveyances of this kind. They all go upon the ground of defrauding creditors or purchasers, & against such are void, whether at com. law, or by Statute.

I will here remark that the conveyances, which are of this kind, that I shall most frequently consider, are those of real property, yet the rules are precisely the same as to personal prop.

I shall first consider these conveyances as respects creditors, & then as they affect purchasers.

As to creditors, fraudulent conveyances are void at com. law, & whether the Stat. was declaratory of the com. law, or whether it introduced new law has been a matter of some question. I think, says the Judge, it has introduced new law, for at com. law they were void only as to prior creditors & not as to subsequent ones. More of this hereafter.

General rules respecting fraudulent conveyances.

1. The first rule is that a fraudulent conveyance is good between the parties to the conveyance, & all claiming under them, as heirs, Executors; i.e. the contract binds both grantor & grantee; by which I do not mean that the contract is good of itself, by itself.

II. To prefer one creditor to another when there is not property enough to pay them all is not fraudulent, tho it is done with intent to defraud the other creditors. This is the common law doctrine, tho such conveyance under the Stat. of Bankruptcy, would be considered as fraudulent; & the reason of the com. law principle is, that any man has a right to prefer one creditor to another, and any creditor has a right to prefer himself to other creditors; or in other words, a man has a right to pay which of his honest debts he chooses.

III. Unless this conveyance is made in satisfaction of a debt, or to secure a debt, it is fraudulent if it is an absolute deed, - So also it is fraudulent to give an absolute deed of property of large amount to secure or settle a debt of small amount; i.e. it is fraudulent as to other creditors & they may take it; it ought to be conveyed by mortgage in such case, that other creditors may redeem it. - -

IV. It is not necessary that this conveyance should be made to a person who is not a creditor in order to render it fraudulent. Suppose it is made to a creditor to pay a debt, now this may be fraudulent; & inadequacy of price would furnish evidence of fraud, or that it was given in trust for the grantor. Compare this debt, with the value of the property conveyed & this will determine whether it is fraudulent or not; other creditors may claim this property; & the creditor, to whom the conveyance was made, must lose his debt, for he was concerned in defrauding other creditors. To be sure, if he has not given up his evidence of his claim, as a note for example, he may stand his chance with the rest in attaching the property. -

V. A conveyance for a full consideration, if made with a view to avoid civil process, & with the privity of the grantee, is void -

for it is an assistance by grantee to cheat grantors creditors, & the law says it shall not be done with impunity; secus, if the grantee knew nothing of it; in such case he will hold it.

VI. ... Voluntary conveyances, tho not made with a view or intent to cheat or defraud creditors, still if they do operate fraudulently against them, it is considered a kind of legal fraud. Thus a man conveys a piece of land to his son, supposing that he is worth more than sufficient to liquidate his debts, & it proves afterwards he had not more than sufficient to pay them at the time; here is no intent to defraud, yet the law will consider a kind of fraud as to the creditors. The Judge calls it voluntary fraud, it does not subject the committer of it to any punishment.

VII ... There is a difference between voluntary & other fraudulent conveyances, i.e. there may be a difference. ... A fraudulent conveyance made with a design ~~to design~~ to defraud, is void, both as to prior & subsequent creditors. But a voluntary conveyance is not always void as it respects prior & subsequent creditors; it may be void only as it respects prior, & the conveyance may be made under such circumstances as to be void as to subsequent creditors.

VIII ... This intent must be an intent to defraud; therefore it does not apply to any particular property, provided there is enough to satisfy all creditors. So a man who suspects his creditors will come upon him may convey away his house & house lot to his neighbor in trust for him provided there is property sufficient besides this to satisfy his creditors, & they in such case are not allowed to take that, which he has thus conveyed. But suppose he, to whom he has made this conveyance, refuse to reconvey, he may be compelled to do it as they. But a person cannot convey personal prop. in this way, even tho' there is sufficient left for creditors. Quere, does not the last, but one, sentence contravene the first rule, which says such conveyance shall be good between the parties? J. J.

Contracts.

I have now given the general rule upon this subject; but here it may be asked, whether the Statute was declaratory of the common law upon this subject, or whether it introduces new law? Lord Mansfield says, in Cowper 434. that it does not introduce any new law, but that the com. law was sufficient to support all cases. There is only one case in support of Lord Mansfield's opinion, which is reported in 3. Co. 82. - Case was this. A man conveyed away all his property to avoid a penalty; the penalty was not incurred, i.e. no judgment had been rendered at the time of conveyance. Now it was contended that this was only void agt. prior creditors, by the com. law. But it was decided that it was void agt. the Queen, who was a subsequent creditor, in this case. No case but this. I should say, says the Judge, that at com. law these conveyances were only void agt. prior creditors, notwithstanding Ld. Mansfield's opinion in Cowper. But this point is settled in Saunders 10 5. as I have stated.* see Pro C. 4 Ch. 4. 3. J. Ch. 546. -

Voluntary Grants.

These grants when there is no fraud are sometimes good & sometimes not good. Few cases where they are good agt. subsequent creditors; if there was an indebtedness at the time of conveyance, they are void, as to prior & subsequent creditors even if made for a good consideration, as to Son, daughter &c. &c. -

But a voluntary grant to a Stranger is void, both as to prior & subsequent creditors, even if there was no indebtedness at the time of the grant. -

But suppose the conveyance is made to make provision for some of the Grantors family, is this good? This depends upon the fact whether he was indebted at the time, i.e. considerably so; if he was, the conveyance is void, both as to prior & subsequent creditors. -

* cf. Lord Mansfield's opinion, & that a gratuitous [illegible]

Again, suppose it was made for the provision of the family, as before, & there was no indebtedness at the time, but it was made for some person or persons not in Esse, the rule is, it is void as to prior & subsequent creditors.

Again suppose the conveyance made as before, to make a family settlement, & there is no indebtedness at the time, & it is made for some person in Esse at the time; it good agt. creditors. But still if it was made with an intent to get into debt immediately, it will then be void agt. subsequent creditors. 1 Bro Chy. 90. - 2 Atk. 94. 481. 600. 520. - 2 Ves. 10. Talb. cas. 64.

It seems necessary by the words of the Stat. that these conveyances in order that they be fraudulent, must be made with an intent to defraud, & thus it seems necessary to find out what this intent is, & you will remark that it differs from other cases of deception; for by the construction of this Stat. the circumstance of the existence of a subsequent debt is sufficient evidence of an intent to defraud, notwithstanding these debts were contracted after the conveyance was made, & this presumption raised by the Stat. cannot be rebutted. It is a presumption of law & not to be overturned. 9 Co. 11. Cro E. 158. - -

Thus far we have considered the Stat. of 13. Elizabeth which relates to creditors; we come now to consider the Stat of 27 Elizabeth, which relates to purchasers. We have no such Stat. as the 27. Eliz. in Conn. tho there is a similar one in most of the States.

This Stat. 27. Eliz. makes all voluntary conveyances, fraudulent & void agt. purchasers for a valuable consideration. It is made to protect such purchasers - -

Thus if A. S. makes a voluntary conveyance of his farm to

to his son Tom Stiles, & afterwards conveys the same farm to Stephen White for a valuable consideration. Stephen White will hold the Land for there was a fraudulent intent. J. S meant to get the money of Stephen White & at the same time have his son Tom hold the farm. It makes no difference, whether Stephen White knew of the voluntary conveyance or not, for he will hold the Land in both cases. Cro. J. 158. 5 Co. 60. Eq. cas. ab. 324. Am. 6. 288. Comp. 280. 2. Bro Ch. 148.

Now all this applies, when the consideration is merely good as well as when there is no consideration at all. In a valuable consideration the idea of family settlements must be excluded, for that stands on different grounds from good considerations, i.e. money or property. The conveyance can never be fraudulent except in such cases as I have mentioned, namely, where one man sells an other to cheat his creditors.

Conveyance in consideration of marriage is excluded in this case, for it stands on a different ground, tho it is considered in oth. cases as a valuable consideration. Now these marriage settlements may be made upon Children, & Children not in Esse. But the question is are they good as agt. creditors & purchasers? They are good if they are reasonable; but if a man should settle his whole estate upon his children in order to defraud his creditors, it is not good, for there is an actual intent to defraud.

But if a husband makes a settlement upon his wife & issue, with a limitation over to some other person such settlement is good only in the Lands of the wife & issue, & the husbands creditors may take it after they have done with it, for it cannot go to the remainder man in prejudice of creditors or purchasers.

But suppose the Father of J. S. should make a settlement upon the wife & issue of J. S. with remainder over to some other person-

person. Now in this case the limitation is good & the creditors of H.S. cannot meddle with it. They can't take it at any time. Id. Ray 174. 2 P. Wms 39. 245. 248. 351. —

Suppose the settlement is made after the marriage, is this good against creditors? Yes, provided the person who makes it is not encumbered or indebted at the time & it is settled upon the wife & issue. —

But such settlements are not good agt. purchasers, even tho he was not encumbered at the time. But a settlement made before marriage is good agt. both creditors & purchasers. 6 Co. 9. 158 2 Lev. 146. Cas. 432. 278. 2 Bro Ch. 148. 3. Ves. 617. —

This proposition as to settlement made after marriage as to purchasers requires qualification; for if it is grounded on a prior agt. to settle it is good agt. purchasers. Eq. C. 354. Vent. 193.

Suppose this case was a parol agt. this is within the Stat. of frauds & perjuries, & neither the wife or issue can compel a settlement to be made. But suppose the husband makes the conveyance in pursuance of the parol agt. now it is contended that it is not good, for there was no legal process to compel him to do it. But it is now settled that if he voluntarily makes the settlement in pursuance of the parol agt. it is good, the same as tho the agt. had been in writing. Cas. T. 434. 2 Ves. 304.

Suppose the hus. after marriage complies with the parol agt. but does not perfect it, i.e. puts the parol into written articles of agt. — now Equity has refused to put this agt. in to execution when there has been a purchaser; but upon what principle they refuse, says the Judge, I know not.

But in this case if the purchaser knew that articles of agt had been entered into, he gets no title which Equity will enforce.

& Equity will cause the hus. to execute such agt. in favor of the wife & issue. 2 Ves. 304. Chy 287. a 187.

Remember that the settlement must conform to the prior articles, if it does not it operates as a settlement after marriage

Settlements made in consideration of marriage, when there has been no prior agt. may be good provided certain circumstances take place; — So after marriage if the wife receives a portion from any person, the hus. in such case may make a settlement upon his wife, out of property so received, & this will not be fraudulent — So if this Estate should be given in trust for the wife & not directly to her it is not fraudulent, provided it is a reasonable transaction. 2 Ves. 18. Amb. 121. Atk 188. 2 P. 477. —

There is a species of settlement made after marriage, viz a settlement made on the wife to live separately — now such settlements are of no validity as agt. creditors, they are void as to them, but as between the parties they are good. —

Altho' the word voluntary is not used in the Stat. we shall find that all voluntary conveyances are void agt. creditors, except family settlements; & even here if there was an intent to run into debt afterwards. Com. 434. 2 Atk 182. Amb. 596. — —

The doctrine of fraudulent conveyances, extends as well to personal as real property except in one instance, viz. money, when a man gives away his money to defraud creditors, says the Judge, I know of no way to recover it back, for money is not the subject of an Execution, it cannot be levied upon.

In Conn however to levy upon money, so it would seem there was no difficulty as to the remedy here. But there also seems to be an absolute absurdity about it, for money like all other prop. subject to Ex. must be disposed of at the post. Eq. Cas 149. ver. 400.

Contracts.

Cases which frequently happen. Suppose J. S. finding himself in pecuniary circumstances, & being willing to do what is right thereupon with his creditors, makes a legal assignment of all his property to trustees for his creditors. Now this will not bind his creditors unless all of them agree. He must first make a compromise with the whole of them, & if they all consent it is good. But suppose he should appropriate his prop. to certain creditors, & those certain creditors take possession, now this is not fraudulent. for a man has a right to pay for his creditors. 5 J. R. 420.

But there may be badges of fraud even in this case; thus if grantor remains in possession it is evidence of fraud. So also in the previous case, the prop. being permitted to remain in grantors hands after it was appropriated for the payment of debts, was evidence of fraud or trust between them.

Suppose a man makes a conveyance of his Estate to creditors, whose claims are barred by the Stat. of limitations, i.e. were barred at the time of the conveyance, is this good? There is a diversity of opinion respecting this, & I have found no actual decision says the Judge. — But, he says, it appears to me it is good, if we only consider the nature of the Stat. of limitations. If the idea is that a debt barred by the Stat. of limitations is no debt at all, then such conveyance is fraudulent. But this is not the correct idea, for it is clear that a promise made afterwards revives the debt. So also if a man promise to pay half the debt, which is barred this half may be recovered; so the idea seems to be this that only the man means to rely upon the Stat. the debt may be recovered. For suppose a man orders all his debts to be paid in his will, debts barred by the Stat. of limitations must be paid. The Court therefore does not go upon the ground that there is no debt,

& I am clearly of the opinion, says the Judge, that the conveyance mentioned before is a complete waiver of all reliance on the Stat. of limitations, & not fraudulent. If a conveyance is made in trust for creditors, & they all agree to it, such creditors may compel a performance by trustee, & a purchaser from trustee cannot hold it if he has had notice of the trust. Swy. R. 33. — — — — — — — — — — — — — —

Charitable Donations. —

It is difficult to know how far the law upon this subject has application to our own country. In Eng. this donations were carried such an extent that the Stat. of Mortmain was enacted to prevent them. But afterwards a Stat. 43 Eliz. was enacted, which allowed them in all cases, except for superstitious purposes. We have no such Stat. as the 43 Eliz. in Conn. There has been a question in Eng. whether this Stat. altered the Com. Law as it stood before its enaction — for by Com. Law these donations were good agt. creditors. But it is now settled they are void agt. prior creditors, & good agt. subsequent purchasers, provided he has no notice. Ves. 230. —

Donatio causa mortis This is good agt. creditors. P. Wms. 405. —

Now in what manner is the creditor to get hold of this property, for the Executor has no right to it, he can't recover it? The mode is this. The Donee is considered as Executor de son tort, & the creditor may take it from him. In Conn. however we have adopted a different mode, for under our average law there can be no Exec. of his own wrong; we consider it as like any other debt, & the donee can't have the bequest unless there are assets enough to pay all the debts. The Executor may recover it, & provided there are not assets enough he may bring trover for it & recover. The Estate is then considered as insolvent & the Exec. is acting for the creditors. This is also the mode in Penn. Yeates 177. 3 Ves. 111.

Contracts.

Suppose a man makes a conveyance generally to some of his creditors; now unless he appropriates this for the payment of his debts, it is not good, it is void as to the rest.-

Suppose J. S has plundered J. N. & he suspects J. N. will prosecute him, & to avoid this he conveys all his est. to his credit-ors. Now J. N. can only have the surplus after the debts are paid. Eq. Cas. Ab. 149.

Suppose J. S. wishing to defraud his creditors, should purchase land with his money, & take the conveyance of the land to his children C. & D. The question is, whether this is a fraudulent conveyance agt creditors. Courts of Law have decided that it is not fraudulent. But relief may be had in Equity upon equitable principles. Equity says, so far as it respects creditors, these children hold the estate in trust for their father. Cro. J. 550. 2 Vern. 490. 702 Ch. 231 P. Wms. 111. 607.

But suppose J. S. should, in this case take the conveyance to himself & son, now on the death of one of them, there would be no survivorship as in other cases of joint tenancy, & Chancery will grant relief. 2 Atk. 481. 1 Ves. 370.-

Suppose a woman, who is Executrix, marries, & the hus. voluntarily conveys away the Est., of which she is Exx. to B. is this fraudulent? i.e. can any creditor of the hus. take this property. It is settled that creditors cannot, for the hus. never had any prop. in this Estate. But this may be a devastation as to the testators creditors. Cro. E. 29.-

Voluntary Bonds.-

These may be fraudulent agt. creditors. Thus suppose J. S. knowing if he conveys his land voluntary to his son it will be void agt. creditors, takes this method to avoid the stat. viz. he makes his son a creditor by executing to him a bond. Now this is a fraud-ulent

fraudulent transaction; but it is difficult to prove it, especially in the life time of the obligor. If it can be proved T. S. has paid this bond in money, application may be made to Chy. & they will order it refunded, for this bond must be postponed to creditors. Suppose T. S. does not pay the money, but his son sues him on the bond & takes out Execution & levies it on his fathers lands. Now any creditor may go & levy upon it. the same as if the prop. was in T. S. & in this way try, who has the title, the son or the creditors. P. Chy 17. Atk 293. - Suppose T. S. dies without paying the bond — his son calls upon the Executor of his Fathers &c. for the money, now if the creditors object to the Executors paying it, it is the duty of the Exec. to file a bill in Chy compelling the creditors to come & contest the debt or claim, & in this way prove the sons bond fraudulent agt. other creditors, it being voluntary. You will remark that creditors may in all cases enquire into the consideration of the bond. - - - - - -

There is one case in which this bond may be proved fraudulent in a court of Law. Suppose the Exec. of T. S. has been sued by the son for the payt. of the bond - & T. S. a creditor, has also sued the Exec. & to T. S.'s suit the Exec. pleads he has assets sufficient only to pay the sons bond; now T. S. may reply, that that bond was voluntary. P. C. 307. -

This bond after all the creditors are paid is good, it is superior to the claims of legatees. Atk. 625.

If a man give a bond to his wife, that he will settle a jointure upon her; & he does so, & it turns out that he has no title to the lands & she is ejected; on application to a Ct. of Eq. they will decree, that she be paid out of the personal property, previous to any other voluntary bond. - Ca. t. H. 74.

Contracts.

Suppose a man were to convey land on a voluntary contract. It would be void agt. creditors, it would be of no avail. Pl. 17. Eliz 202.

A. makes to B. a fraudulent conveyance, & B. conveys to C. a bona fide purchaser. question whether the creditors of A. can take this land from C. & hold it. This question does not appear to be well settled, but, says the Judge, I am clearly of the opinion that the creditors of A can take it, for I suppose nothing can give effect to such conveyance. Consider this upon principle. & first the construction of the Stat. in this way will defeat the objects of the Stat. which is strong proof that this is not the true construction. Now the object of this Stat. was to prevent the grantor from conveying his property out of the reach of his creditors without any consideration. & another object of the Stat. was to discourage such practice. Therefore once admit that C. can hold agt the creditors of A. & the Stat. is nugatory, for A & B may at any time, or in any case, put their heads together & cheat all the creditors.

Again, the obvious construction of the words of the Stat. is that which I contend for. For as B. has no title agt the creditors of A. it is evidence he cannot convey any.

But it is said there is an analogous case, in which the bona fide purchaser holds. But I know of none, except where the grant was in consequence of some prohibitory law, & these cases are not analogous to the present. So where the property is sold in market overt the purchaser is protected. So if sold at any public vendue, or property sold at the post, the purchaser is protected. But these are public transactions, & there is nothing private about them as in the present case.

Again it is said that the equity of C. is great as that of the creditors of A. — Then they introduce the maxim, "Potior est conditio possidentis"

posidanlis," which they say decides in favor of C. But this is a misapplication of the maxim, i.e. it must always yield to the following, "prior in tempora. potior in jure." Thus suppose A. steals a horse from B. & sells him to C. B. sues the horse in the possession of C. & claims him — & C. says I paid a bona fide price for him & am in possession, & therefore ought to hold him — but B. says my right to the horse existed previous to yours, & quotes the latin maxim, prior in tempore &c. and this answer of B.'s is conclusive, he must have the horse. In all cases of equal equity, only he one have the prior right, & the question is determined. But if A had purchased this horse from B. & sold him to C. B cannot introduce this maxim to ~~contradict~~ evict, prior in tempora &c. even tho A had cheated him egregiously.

Again it is contended that B may sell this land to C. as well as to A. for it is not contended but that A may sell for a bona fide price. Now I can agree to this, says the Judge, provided the purchase money goes into the hands of A. but the fact is otherwise, for B. recieves the money & is under no obligations to pay it over to A. But, say my opponents let the creditors go to B. for their money & then the deed is not defeated, say they. I answer that no man is obliged to change his debtor in any case except one, & that is when a feme sole is before & pays rent; in this case, upon the feme marriage with the Baron, she is discharged from the payment of rent, which accrues during the coverture & this depends upon the particular relation between Baron & feme — & the debtor cannot be charged in any other case i.e. creditor is not obliged to do it.

We will next consider this question on the ground of authority. There can be no doubt, but there are authorities that the feoffee under a grant can convey to C. under the Stat. of

27 Eliz.

27. Eliz. for this Stat was made to protect bona fide purchasers — now the decisions under this Stat. must not apply to cases under 13 Eliz. for this respects Creditors. This is frequently done, but the reasons in one case do not apply in the other; there is an express provision in the Stat. 27 Eliz. to protect purchasers, but there is no such provision in the 13. Eliz. which relates to Creditors — now there is no decision in the books opposed to my opinion, & only one dictum of a Judge in Godbolts Reports. For the true construction of the Stat of 27 Eliz. see Sid. 133. Str. 243. 2 Shw. 423. 3. Lev. 387. Godbolt 161. Upon the 4th Section of the Stat. 27. Eliz. one Elementary writer thus remarks — that whenever this valuable consideration arises, the fraud is obliterated. —

A question of this kind has arisen, A. made a voluntary grant to B. B. grants to C. for a valuable consideration — C. makes a voluntary grant to D. — the question is, can D. hold? It is settled that he can — 2. 15. T. R. 1019. —

Thus fraudulent conveyances may be so made, that it is difficult to detect the fraud. But there also various badges of fraud, which often times amount to sufficient proof. — Thus suppose S. S. conveys an Est. to T. N. to secure a debt, — now if there is a great difference between the debt secured & the value of the land, it is evidence of fraud. This conveyance ought to be in the form of a Mortgage. So also if the grantor keeps possession of the property this is evidence of fraud, tho' it is conveyed absolutely in discharge of a debt. It is true remaining in possession of landed property, is not as conclusive Evidence of fraud as remaining in possession of personal property. But here if rent is not paid the evidence is sufficient. Salk. 368. —

Suppose real property is fraudulently conveyed, and the

— grantor —

grantor dies? Now under the Eng. law this will descend to the heir. If it is wanted to pay debts, it goes to him for the creditors and not for himself in this case. Dyer 195. 1 Rob. 72. 1 Plowd. 521. Vaugh. 64.

Contracts void or voidable through force or fear. If this force amount to legal duress, the contract is void at law, duress may be plead to avoid it. There are many cases, which do not amount to duress, in which Ch'y will grant relief. A case of this kind, tho it has been complained of, yet I think that the interference of Ch'y was just & proper. An old lady had a daughter possessed of a large fortune; a young man paid his addresses to her & offered to marry her; & the mother told the young man she would use her influence with her daughter not to marry him unless he would enter into a contract not to call her (the mother) to an account for the rent & profits of her daughters land; & the young man, rather than lose the girl, gave a discharge to the old woman, but he afterwards applied to Ch'y, & they set aside the discharge as having been extorted from him in an unfair manner. P. Wms. 114.

Duress is of two kinds. 1st. Duress of imprisonment. 2 Duress per minas.

1. Where a man is falsely imprisoned, & in order to regain his liberty he executes a note or other obligation, such note or security is void at law. But if a stranger should give such security to obtain the liberty of another, this security would be good. It is not material whether there is a debt really due or not, for even if there was, still there may be duress in obtaining the security. Thus suppose P. owes V. N. £20. & V. N. takes him by the throat, & swears he will not let him go until he gives him a note for the £20. Now this is obtained by duress & void.

But -

But suppos. a man is im. prisoned legally, & gives security anew; this is good & not durefs if it is fairly done. But if there is any unfairneſs it will be durefs in this case. Thus suppos. A.S. has Jon Stokes in Jail, & Jon wishes to give a new security & be at liberty; & S. says he will not take one, unleſs he will make a new contract with him - now if Jon gives new securi = ty it is void, it is durefs. - So also hard usage may amount to du - refs. Co Litt. 253. 2 Inst. 482. 3. Leo. 239. -

If a mans person is attached & put to Jail, tho it is for a most unjust & unfounded claim, still it is not durefs; but if the creditor compels his debtor, who is in jail, to give new se = curity for some other debt, this is durefs. Roll. 687. -

If a person is arrested & imprisoned by a proceſs iſsuing out of a Ct not having jurisdiction, & a security is given by him in order to regain his liberty this is durefs. Cro. E. 446. Roll. 687.

So also if a man, should falsely charge another with the commiſsion of felony, have him arrested, & then agree to dis = charge him if he would give him a note, now this note is void for durefs. Allyn 92. or 32.

But if the proceſs is a legal one, nothing short of durefs will avoid the security in a Ct of law. So when A. obtains judg = ment agt. B. upon which B. took an unjust & unfounded suit agt. A. & then agreed he would withdraw his suit, if A would discharge his judgt. & A did so; but a Court of law would not hear durefs pleaded by A. - Lev. 69. -

If this security is given by a stranger to obtain the lib = erty of his friend, it is not durefs, & the security is good. Roll 687. Brownlow 66. Cro. J. 137. - But if A. should employ B. to obtain a note from C. by durefs, it would be durefs in A. Roll. 687. - - - - -

A son may avoid his contract for duress to his father & vice versa, and the hus. for duress to the wife. But the servant cannot avoid the contract for duress to his master, nor vice versa.

To seize upon or attach a mans property, in order to make him give a bond, note or other security is not duress at Law. 2 Roll. 124.

II. — Duress per minas. This happens where a man is threatened with loss of life, limb or with great bodily hurt, to avoid which, he gives a security; now this security is void; it is void also if given to avoid being falsely imprisoned. But to threaten to fleg or whip a man unless he will execute a note &c. he complies — now this is not duress at law; tho I think it would avoid the security in Chy. says the Judge. 2 Inst. 483. —

But these securities obtained by either kind of duress, if ratified after the duress is removed are good; & thus it seems they are voidable only. Roll. 862. 2 Eyer. 143. —

In case of Wills something far short of duress is sufficient to set them aside. Continual importunity would be sufficient in this case. Duress must be pleaded specially. 5 Co. 119 b.

How far Chy will interpose in Contracts obtained by something short of Duress, see 2 Vern. 497. P. Wms. 118. Atk. 409. 2 Ves. 635 P. Chy. 266. 3 P. Wms. 294. Ves. 19. —

Contracts, within the Statute of Frauds and perjuries. —

I shall first make some general observations upon this subject. — There is a rule as to executed contracts, viz. that no man can grant away that, which he has not, if he does it is a void grant. So if a man should grant away all the wool, of which he should ever be possessed; now this is void for he has the wool neither actually nor potentially. But if a man should grant all the wool he shall have this year it is good. altho he has not the wool actually —

actually, he has it potentially; for he has got the sheep, which will in time produce the wool. - Hobart 132. -

Suppose A. leases land to B. which he does not own & B. agrees to pay rent, & A. sues him for it; now is B. obliged to pay it? No, for the lease is void, therefore B. was under no obligation to pay. Co. L. 44.

But if A in this case procure a good title before the suit is brought, then B. must pay rent, A's title claim is good. This rule applies to the sale of all lands, where there is no title; for if the consideration fails it may be recovered back again; but if title is obtained afterwards, it is then good. -

Case in the books of this kind - A sells a horse to B. on the 1st day of Sept^r. & is to keep the horse till the 1st day of Dec^r. then B. is to take him. - Before Dec^r. arrives A. sells him to C. & B. does not come after the horse at the appointed time, upon which A goes to C. & demands the horse back telling him he had no right to sell the horse at the time he did, for B. was the owner, & as B. did not come after the horse at the time appointed the horse now became his, i.e. A's - The court said that A could take him. Though I conceive, says the Judge, they decided not according to law; yet it has never since been contradicted, no case of the kind having since arisen. - 1 Roll. Rep. 438. - - - -

Contracts have a different construction in a court of law from what they have in a court of Equity. (There is a difference, but no opposition, i.e. contradiction). Thus suppose a man should covenant to convey lands & afterwards refuse, now at law you can only recover damages for this breach or non performance; but Equity will enforce a performance, & oblige him to convey according to covenant. - - - -

Again, suppose a man enter into a bond, the condition of which

of which is, that provided he convey Lands by such a time the bond to be void & of no effect; now if he refuse to convey a court of Law would say that the bond is forfeited, but a Ct. of Eq. will consider this bond as a covenant to convey; i.e. they give it this construction & will compel a conveyance. 2 Ves. 373. 10 Mod. 517. 9 Pr. Wms 2.

Case of this kind. A man before marriage gave a bond to his intended wife, that he would make a settlement upon her after marriage, after which the bond was to be void. Now a bond thus given from hus. to wife, upon the mar. is at an end, for it then rests in the hus. by virtue of the mar. But an agreement merely entered into by the parties before mar. is good & binding, and Chy. in this case consider the bond merely as an agreement or bargain & will enforce a performance of it. 2 Ver. 430.

So where a man borrowed £70 of another & was to give security in Lands, & gave a warrant to his atty. to confess judgt. in ejectment & the man who made it then died by which the lender was to lose his security, but Chy said it should hold. 2 Ver. 261.

Again, suppose two persons give their joint bond for a joint debt, now it is the duty of each to pay the one half of this debt, but either of them is liable alone. Suppose if of them pays the whole; he may recover the one half out of the other in a court of Law. for they consider this as an agt. between them, that if one pays the whole, the other will pay his share. But in Equity bring an action on the case to recover this back. 2 Ver. 371. 4

Suppose a woman gives her bond to her hus. Elect, that she will convey her Lands to him after marriage, he having made a marriage settlement upon her; now he cant sue his wife in this case, but Chy will consider this as a mar. agt. & will decree her to convey to him. Duck Lut & Campbell. 2 P. Wms.

This rule is laid down, viz. that Ch'y will protect the assignment of bonds, altho at Com. Law they are not assignable instruments. Thus suppose J. S. gives a note or bond to J. N. and J. N. sells it to S. W. now J. S. must pay this note to S. W. if has notice of the assignment. But suppose J. N. discharges J. S. in such case Ch'y* will compel J. N. to pay the note or bond if he put his name upon it, for S. W. may write a covenant or warrant over it. But suppose J. N. is a Bankrupt & J. S. has paid J. N. in such case also Ch'y will compel J. S. to pay it over again, for they consider him as having practised fraud. Ld. Ray. 683. 2 Ver. 540. 2 P. Wms. 608.

It has been questioned in this case whether S. W. might not go to J. S. in the first instance, without going to J. N. at all.— I should think, says the Judge, that it was not safe to go to him without making an averment, in the petition that J. N. was a Bankrupt.— Ch'y will admit parol testimony to prove agreements provided they are not within the Stat. of Frauds & perjuries, & tho' they are within the Stat's. part performance will take them out. It sometimes happens that you have no direct proof, either in writing or by parol, in such cases, circumstances, which attending the fact or such as would naturally result or follow from a transaction may be introduced to prove the fact or agreements, & these circumstances may be proved by parol. It is a rule that parol proof cannot be admitted to prove the terms of a contract in many instances, but you may prove circumstances by which you can infer the terms of the contract.

Terms used in Contracts. The general rule is that you must affix the same meaning to the terms not technical as is affixed when the contract is made, & which the parties were supposed to intend. — — —

Contracts.

A technical term must be construed legally, unless you can gather another meaning from the instrument. Plow. 86. –

At common law twelve months mean lunar months, & so understood in Eng. tho a twelve month there means a year. In mercantile law 12 month mean 12 Solar months. 2. Bl. 140. 1. Co. 61. –

In construing terms you have a right to take in all the circumstances – the nature of the transaction, & also the common usages & opinions on the subject under discussion. –

In a warranty of lands agt. all molestations &c. now this is not a warranty agt. a trespasser, but only agt. claimants or another title. Cro. J. 425. Cro. E. 212. 4 Co. 80. –

Construction of terms. – If by adopting the grammatical sense the intention of the parties will be defeated you are at liberty to deviate from it. –

Formerly there was a difference between from the date & from the day of the date; the former including & the latter excluding the day of the date. –

A freehold cannot commence in future, but in conveying one, it is to arise or commence from the day of the date, which in law means the next day & is void. But we will not defeat the intention of the parties by adhering to the technical sense, we will consider the freehold as commencing on the day of the date – Other examples might be adduced, but it is sufficient to observe they all prove, the design or intention of the parties should be enforced when not illegal. When an Estate is given to A & his heirs, the Estate is always considered as given to A in fee. "Heirs" only denote the quantity of Estate, not the persons, who shall inherit to A. – When given to A. for life & the heirs of his body, Cts. of law throw away the words "for life", & it is a fee tail. But they will not do this, but enforce the intention of the testator. Lewis 271. . . . . You –

Contracts.

You are to be governed by written contracts, tho' the circumstances may be introduced to elucidate or explain. 3 Mod. 278.

You are to take into consideration the particular matter about which the parties were then conversant, in order to elucidate the meaning or design of the instrument & also its extent & nature. Eq. Ca. Ab. 170. Lev. 101. 22.

When speaking of living creatures of any kind it is deemed to extend to all of that kind. Where a Stat. says "all men" it means both Genders. So in other cases. Co. L. 170. Dyer. 124.

In the books it is laid down that a contract to pay so many pounds, that the pounds shall be valued according to the estimation of those pounds, when the money is to be paid. So of all other general expressions about money. The Judge thinks this would often defeat the intention of the parties, & he thinks that circumstances ought to be introduced to explain. Dav. R. 28. 2. P. W. 88. 696.

When an instrument runs to be paid by such a time, & nothing is said about interest; interest must be paid in the nature of damages, tho not exceeding lawful interest, let the damages be ever so great or small. P. Ch. 128. P. W. 196.

The interest must be such, as it is when the money is to be paid, if nothing is specified to the contrary.

When a contract is made to pay 10 Bushels of wheat, by such a time, & the wheat is not delivered, in this case the payee can recover the value of the wheat, at the time it was to be delivered with interest. Eq. Ca. 82. Tho' suppose he should pay part within the time can you compel him to pay the residue?

Rescinding contracts. - A & B make a contract & the wish to rescind it. If the time of performance has not arrived, they may rescind it by parol if the contract was by parol - if the contract was

in writing by giving up the papers. If the time of performance is past & the contract has not been fulfilled, they may in Eng. rescind it by a written release sealed, but in Conn without seal, specifying a consideration received.- Without such writing their agreements will not bar the oblige from bringing his action, because he has received no consideration. 2 Bro. 116.

One of the parties may rescind when the terms of the contract are such as will permit him. 1 K. 135.

When a person benefitted by a contract prevents its fulfilment it amounts to a discharge. 8 Co. 92. Co. Litt 206.

Length of time will frequently rescind a contract, if not attempted to be enforced within that time. Bro C. 374. -

The party who was to perform, or rescinding shall be put in statu quo; as if the contract had been performed. -

When the contract is rescinded or prevented from being executed by one who was to be benefitted thereby, the other shall be put in the same state as if it had been performed. Co. Litt. 206. -

In Conn. damages are given him, instead of the whole benefit of the contract as tho performed. - The Judge thinks this is the best way. -

Merger. A security of a higher nature swallows up one of a lower. A collateral bond or security does not prevent the holder from bringing an action upon the higher direct security, if he please. 6 Co. 45. Cyc. 24. - Contracts of the same nature do not merge each other, when the same in quantity & quality. Bro. J. 571. 817.

If you have a bond no void: But a sealed instrument at Com. Law would discharge it, i.e. the proof must be of as high a nature, as the instrument. This is an old maxim, but not adopted in Conn. & in Eng. it is now contradicted by Statute. - - - - - - - - Statute &c.

Contracts.

Statute of Frauds & Perjuries. by Mr Goulet.

There is a material difference at common law between written & unwritten contracts. Contracts at com. law are either simple or special. A contract under seal is a special, & one not under seal is a simple contract. The former is always in writing, the latter may be or not.

The distinction introduced by the Statute of 29 Geo. 2. which is the Statute of frauds & perjuries is different from the common law distinction. For the distinction by the Stat. relates to written and unwritten; common law distinction was special & simple.

Statute of frauds & perjuries in Conn. was enacted A.D. 1771. & so far as it relates to the same objects is a transcript of the English Statute. Dac. 72. Stat. Conn. 216. 2 Root 159. 1 Kirby 269

Under this Stat: there are certain contracts that cannot be enforced either in Law or Equity, unless reduced to writing, or there is some note or memorandum of it signed by the party or his agent thereunto lawfully required.

These contracts are of five kinds under our statute, viz:

I. — Promises, made by executors or administrators to answer the debts or duties of their testator or intestate are not binding unless reduced to writing, according to the provisions of the Statute.

II. — Promises made by one to answer the debt, default or miscarriage of another, must be in writing, else they are good for nothing.

III. — Agreements in consideration of marriage, must be reduced to writing, or they are good for nothing.

IV. — The fourth kind consists of contracts or sales of lands, tene-

ments

tenements or hereditaments, or any interest in or concerning them; it should be executory contracts for the sale of lands &c. instead of contracts for the sale of lands &c. This construction has been given the Statute. That to be binding must also be in writing.—

V.— Contracts not to be performed within one year from the time of making them, do not bind, unless reduced to writing, signed & delivered according to the Statute.

By an English Stat. all parol leases of lands, tenements and hereditaments operate as leases at will, with the exception of parol leases for terms not exceeding three years & reserving two thirds of the improved rent. The Judges have of late considered these leases, as leases from year to year, & not as leases at will, so that they cannot be determined except at the expiration of the year. 5 T. R. 16. 4 D. 680 & 8 D. 3. 2 H Bl. 63. 7 T R 14. Roberts 240 & 247.

Again, all sales of wares or merchandize, unless part of the consideration is paid when they are of the value of £10 or upwards, or unless the goods are delivered, i.e. part of them, or unless earnest money has been paid, — when none of these solemnities have been observed & the bargain is not in writing, you cannot recover in law or equity under the English Statute.

Our Stat. in Conn. contains no such exception as to leases of land &c. for it makes no difference whether it is for three years or more. All parol leases are void here, i.e. they are not binding, tho they may be good as a license.

The object of the Stat. of frauds &c. was to prevent persons from proving agreements under the Stat. by parol testimony or account of the importance of some, & the facility in practising fraud in others. — Let us examine the seven different kinds of contracts within the Stat. in the order before laid down. — and 1. —

Contracts.

I. ——. As to promises made by Executors & administrators to answer out of their own funds or estates for the debt of their testator or intestate. Such promise will not bind either in law or Equity unless it is reduced to writing & signed by the party or his agent. —

It has been supposed that if the Exec. or adm. has assets to answer for the debts of his testator or intestate, that a parol promise is sufficient to bind him. But Mr. G. says there is no sufficient authority for this rule, neither is there any reason in it; for were this case the stat. would be no more than the comm. or law. So Mr. G. thinks this opinion not founded in the principles of law. 7 T.R. 350. Cro. 2 Car. 126. 5 T.R. 8. 7 T.R. 350.

It was once holden by Lord King that proof of assets in the hands of Exec. or Adm. would imply a promise on their part to pay the debts of their test. or intest. out of their own Estates, but this doctrine is expressly denied & is not law. 5 T.R. 690. Com. Dig. 2 Dig. 288. 7 T.R. 350.

It is also said that if an Adm. submits a claim agt. him to arbitration, that was proof of admission of assets on his part to answer the claim or debt but this is not law. 1 T.R. 693. 5 T.R. 6. Camp. 453. But if on submission the arbitrators award that he shall pay a certain sum, he cannot afterwards deny assets to that amt. for this is equivalent to a finding by the Jury, that test. or intest. owed. 7 T.R. 453. But finding that the test. owed merely, does not preclude the Exec. from denying assets. Can now consider the award irregularly made. —

Again, it was holden that payment of interest by the Exec. is an admission of assets to the amount of the principal; but this is now denyed & most clearly is not law. 5 T.R. 8.

But the acceptance of a bill of Exchange by the Exec. of the Drawee is an admission on his part, that he has assets to answer the bill. But rem. on bill drawn & accepted by the

of exchange, may be either in writing or by parol, & so may his executors. Chitty 8.23. 12.53 16. 151. 652. 3. 16 Ves. 1. 2 Sea. 1260. Bevw. 1225 Bl. R. 487.

The rule is the same as to the holders Exec. of a bill of Exchange for if he transfers or endorses it he is bound notwithstanding the Stat. in the same way as if the holder had endorsed it himself. Chitty 111. 3. 16 Ves. 1.

But tho a promise by the Exec. to pay the debt or duty of his testator, must be in writing, yet he is not bound if there is a want of consideration; i.e. if there is not a sufficient consid.— For the objects of the Stat. are only to subject him in those cases & in those only, in which he would have been subjected at Com. Law.— But at Com. law this note or memorandum is but a simple contract, i.e, an unsealed instrument, & this never implies a consideration, even if the writing expresses a consid. it. may be rebutted at common law. 7 T. R. 350. & 550. Roberts 202, 126. 5. East 10. 6 Mo. 307.

I doubt whether this rule is law in Com.— for here any written contract is a specialty, whether valid or not. I have seen a recent case where it holden that the consid. of a prom. must appear in writing & that parol evidence is not ~~sufficient~~ admissible to shew that there is a consideration. 5. East 70.

I have already observed, that tho the promise of the Exec. to pay the debt of his testator is in writing he is not bound unless a consideration is shewn.— Now this consideration must be at least provided; there must have been an existing debt, by which the Exec. or Admr., was bound as such, & there is there can be no consideration for the promise. So a promise does not bind the Exec. or Admr. if there was no debt due from the test. tho' the promise is in writing. 2 Saund. 136. Cro. J. 47. Roberts. 206. Adol.

But it is not necessary in your declaration vs Executor on a promise to pay the debt of his test. to aver he has assets tho

tho it is necessary that there be a consideration; yet it is not necessary that there should be assets to subject him, for he is contemplated by the Stat. as answering out of his own Estate.—

Suppose an Exec. make a written cont. that in consideration that he will pay the debt &c.— now the Stat. is complied with, & this written contract will bind him altho he has no assets, for here is a consideration & it is in writing & that is sufficient.— This is important & ought to be well attended to. So if an Exec. gives a note & signs it as Exec. still he is to be sued in his own name, & judgt. goes, de bonis propriis. Robbs on Pr. 205.—

Now in order to take advantage of this clause of the Stat. it is necessary that the Exec. or admr. should have been Ex. or ad. at the time he made the promise, otherwise he is not within the Stat.— So if on the death of P. S. & N should promise to pay the debts, provided they would give him a letter of administration. now if they should permit & N. to administer he would not be bound by his promise, & the reason is he was not admr. at the time he made the promise. Ant. 330. Roberts 201.— Exd. 2d

II.— We are now to consider the second class of contracts within the Stat. which are to be in writing, these promises are made by one to answer the debt default or miscarriage of another.

Under this clause of the Stat. the great inquiry is, what is the promise to answer the debt &c of another. In the construction of this Stat. the criterion adopted, is the distinction between what is called an original & a collateral promise. An original promise will bind tho it is by parol, but a collateral promise in order to bind must be in writing. La. Ray 1087. Cow. 227. Wheels 306. 3 Burr. 1888. The great inquiry then is, what promises are original & what collateral.?—

Exd. ci. 101.

Now promises made for the benefit of third persons are said

said to be original - 1st - when the third person for whose benefit the promise is made is not liable at all to the promisee for if he is not liable at all, there is no debt or default &c on his part for not performing or discharging it. - 2nd - A promise made by one to pay the debt of another is original when the liability of the latter is extinguished on the promise being made: thus if A makes a promise for the benefit of B he being liable, but it is express in the contract when it is made that B shall be discharged, this is an original promise, tho the rule has been questioned & may be considered as not now well established. - 3rd. A promise made by one for the benefit of another is original, where there is a new consideration arising out of a new distinct transaction & moving to the promisor, i.e. operating in his favor. Thus are the three classes of original promises & will bind the party if made by parol as much as if they were in writing. -

But contra, Where a promise is made for the benefit of a third person in aid & in addition to an existing liability on the part of the third person, or made to procure credit for him, such promise is collateral & must be in writing. - So also A promise is collateral when made to furnish additional security to the promisee. 2 Ld. Ray. 1085. Salk. 27. - 5 Mod. 205. 2 Wils. 94. 1 W. 306. H. Bl. 120. Comyn 460. Bos. & Pul. 158. Roberts 209. 216. 223. 224. 232. 3 Esp R. 86. 2 Day 450.

Cases to illustrate the foregoing distinctions. - We will, 1st illustrate the first class of original promises. - Thus suppose A says to a merchant, deliver goods to B. & I will pay you for them. This is an original promise & will bind A altho it be by parol, again suppose he had said deliver goods to B. on my account; and deliver goods to B. & charge them to me. These are original promises. 2 T. R. 81. 2 Ld. Ray. 1087. H. Bl. 120. Roberts 209. 216.

Bul.

But suppose, contra., A says to a Merchant deliver goods to B. & if he does not pay you I will. This promise in order to be binding should be reduced to writing; for it is merely by the way of additional security; but in the former case, the person for whose benefit the promise was made was not liable at all. La. Ray 1086. Comyn. 227. - Salk. 28. 2 Ken. Rep. 120. Esp. Ni 102.

Again, one said to a Baker, "supply my mother in law with bread & I will see you paid; this was holden to be a collateral promise; & the court said that it was evident, that the intention was that the mother should be debtor in the first instance. - 2 T. R. 80. Comyn. 228. Bos & Pul. 158. La. Ray 224. contra Salk. 28. 58, Robert. 223.

In a late case it was left to the Jury to infer what the intention of the parties was, taking into consideration all the circumstances of the case. The promise in this case was in the same form as in the preceding one; the Jury found for the plff, & a new trial was granted, not on the ground that it was illegal for the Jury to infer the intention of the parties, but on a different one. - So it would seem in this last case that the rule was somewhat modified, & the promise like the one in the last case is only prima facie a collateral promise. - Robt. 212. 223. Bos. & Pul. 158. -

Again a case of this kind, - A wished to purchase goods of a person, with whom he was unacquainted, he therefore procured his friend B. to apply to the Merchant for goods for him. - But says the Merchant I am unacquainted with A. - Well says B. "if you do not know A. you know me, I will see you paid." Suppose now says M. G. tho' it was then decided to be a collateral promise that it would be under the same qualification as the case in B. & P. i.e. it would, according to that decision be only prima

facie a collateral promise for it is in the same form the promise was in that case. 2 T. R. 80. Esp Si 101. 102. Rob. Rep 2 10. 211.

So if I promise that in consideration you will let your horse to J. S. I will see him redelivered, this is a collateral promise. So also if I should promise that J. S. should pay the hire. Salk. 27 & 276. Mod. 6 Mod. 248. 3 Salk 15. 1 Co. R. 606. L. Ray. 1085. Rob. Rep 219 32.

A promise that a third person shall do an act, the not doing which, the third person would be liable himself, is a collateral promise, as a general rule. L. Ld. Ray. 1085.

But a promise by one that another shall do an act, for the not doing of which, the latter would not be liable, is an original promise. Thus if I promise that if you will let me have a horse, J. S. will pay you £10. for him. if he does not I will pay you the 10 £. This is an original promise - J. S. not having been privy to it. But in the former case, if you should let J. S. have a horse & I promise I will pay the hire, this is a collateral promise: for here is a contract for bailment & J. S. was liable on this contract; for the law will raise a promise on his part, tho there was no express one. Rob. Rep. 223. Fitzgibbon 302.

Again to make a collateral promise binding, it is necessary the person for whose benefit the promise was made, should be liable at the time the promise is made. Thus suppose the last case, where I promise if you will let me have a horse, J. S. will pay you 10 £ for him. & if he does not, I will. This is original, J. S. not being privy to it.; he was not therefore liable at the time I made the promise. My promise therefore will bind me, even tho J. S. should afterwards promise to pay the 10 £ or should give his note for it; for my promise relates back to the time it was made, at which time J. S. was not liable. Since for it is not a collateral, but an original promise. - To be sure if J. S.

should in this case give a bond or higher security this would merge the simple contract and discharge me. Lord Ray 1085. Ridg. 219. 222. 232.

If a promise is made by one of several persons all of whom are liable already, this is not within the Stat. but is an original promise. Thus suppose two Defts are sued & costs have accrued which both are liable to pay, & one of the Defts promises the Pltff. if he will withdraw the suit he will pay him the costs. Now this is a good promise & will bind him tho by parol. This is not a promise to pay the debt of another &c. —

Again, suppose two or more are liable to pay a bill of Exchange, now if any one of them promises to pay the bill it will bind him, the promise is original. 5 Mod. 205. Comb. 362. 2 East. 325. 5 Mod 213. 2 Esp. R. 484.

I have observed that there are three classes of cases, where a promise made for the benefit of third persons was original, the first of these we have considered. We come now to consider the 2nd class of original promises & which is —

2nd. When the liability of the 3rd person is extinguished when the promise is made, i.e. the promise extinguishes the responsibility of such 3d person — This is an original promise & not within the Statute.

Thus a promise made by one person in consideration that the promisee will discharge a debt agt. another, is an original promise, because it is not in aid of a continual or subsisting liability, nor is it to procure credit for him. — Thus if J. S. holds a bond agt. A. on which 100 £ is due, & B. says to J. S. if you will destroy the bond I will pay you, & the obligee does destroy the bond, now this is an original promise. 3. Burr. 1888. 1 New R. 130 a 180. 2 Esp. 320

I have observed that this rule was questioned, & might be considered as not well settled. Against the rule it is said that the words original & collateral are not used in the Stat.

- indeed they are not - But says Mr. G. I think the rule as it now stands is covered - for I can see no difference between this and other case which is settled law - it is this - suppose in the last case B had said to J.S. I will give you a pair of horses if you will destroy that bond you hold agt. A. - now it is settled that this case is not within the Stat. - But I can see difference between this & the case first mentioned, when he promised to pay the bond in money, there can be none. - Rob. on the Stat. 223. 2 East. C. 325. -

But there is one case coming under this distinction, which is clearly an original promise, viz. when the promisor is the purchaser of a debt agt. a third person, & promises to pay the amt. of the debt to the original holder, this is clearly an original promise. Thus suppose A holds a bond agt. B. for 100£ & C. says I will give you 100£ for that bond, or I will pay you the amt. of it if you will deliver it to me, now this is original, it is not a promise to pay the debt of another. St. R. 130. 2 East. 325. Rood. 226. -

3rd. The third class of original promises is, where a promise is made on a new consideration arising out of a new & distinct transaction. This is an original promise & not within the Stat. - The leading case on this head is that of Leper v. Williams. 3 Burr. - Leper was the lessor of J.S. & J.S. had assigned his goods to Defft. - but the goods remained upon the leased premises, & Leper having a right to go on the leased land to distrain for rent arrear, he went accordingly & Defft. promised him if he would not distrain the goods he would pay him the rent in arrear which J.S. owed. - Now this was a parol promise & out of the Stat. & the Plff. had judgt. the true ground upon which the Ct. decided it was, that the Plff had a special interest in the goods i.e. he had a lien upon them & that he sold his special interest to the Defft. - We must that the

original L. pur remained liable to pay this rent notwithstanding what had been done. 3 Burr. 1886. 2 East. 325. Salk 258. Ld Ray. 759. 3 Esp. R. 86.

A promise to pay a certain sum on consideration that the promisee will withdraw a suit agt. a stranger for an assault & battery or for any Tort, & while the suit was pending L. promises A. mistake) This is an original promise & not within the Stat. thus in the case of Nash & Read - A. brot an action ag. B. for an assault & battery & while the suit was pending L. promised A. if he would withdraw the suit he would pay him 20£. & he did withdraw the suit. now this was an original promise, it was not to pay the debt of another, for no debt or duty was due as yet; for damages only are presumptive in actions sounding in Tort. Wils. 365. 7 T.R. 704. 2 Day 357.

I take it to be a rule says M. G. that there must be a debt or duty ag. a third person either ascertained or capable of being ascertained at the time the promise is made, & I think this is a good criterion to determine whether the promise is original or collateral - for if the debt duty &c is not ascertained, or capable of being ascertained at the time the promise is made, tis an original not collateral promise. - Peters. on the Stat. 208.233.

But a promise to pay a plff a debt which A. owes him in consideration that he will stay the suit ag. A. for the recovery of the debt, is a collateral promise & must be in writing. This differs from the case of Leper & Wms. for Leper in that case hailed with his special interest, but in this case there is no abandonment of any lein. it is merely the case of one person promising to pay the debt of another. Again it is different from the case of Nash & Read. for in that case there was no debt

or duty ascertained or capable of being ascertained. But in this case the debt is ascertained or capable of being so. 2 Wils. 94. 7 T. R. 201. 3. Burr. 1887. 1 R. Bl. 317. 2 Dury 450.

But suppose the promise had been in the last case, that in consideration of plff's. withdrawing the suit, i.e. entering a retraxit. Now this I suppose is an original promise, tho I find no such case. For the retraxit disables the plff. in Eng. from ever bringing another suit for the same cause of action, & it is the same as tho he had said, if you will destroy the bond I will pay you. But that is an original promise, Ergo this is. 3. B. C. 296.

But in Conn. it is clear this is a collateral promise, for here a retraxit is no bar to a subsequent action.

I will now mention several cases which I suppose to be Law, tho' you will not find them in the books.

Suppose one promise to pay a debt due from J. S. if the plff will discharge J. S. from custody after he has been taken upon mesne process. This I conceive is a collateral promise by one person to pay the debt of another, for the debt still continues. But if J. S. had been taken on final process & B. should promise to pay A. if he (A) would discharge J. S. this is an original promise; because a discharge of the debt in this case of final process, is a discharge of the whole debt. 4 Burr. 2482. 7 T. R. 557. 6 D. 525. 7 D. 427. a case in 1 Root 87. decided contrary to my opinion.

There was a case of this kind occurred in Conn, which had nothing to do with the Stat. of Frauds, tho it was supposed to have. A person who had stolen property was illegally arrested, i.e. the process was not legal, & the culprits father promised the owner of the goods, if he would release his son, he (the Father) would pay him the value of the goods. The son was discharged & the Father sued & prevailed in the Fathers favor. This decision is no doubt sound, but the true ground is, that it was a compounding for a Felony.

Contracts.

Some have supposed that when there arises a new consideration of any kind, & a parol promise is made it is good out of the Stat. whether it moves to the promissor or promissee & whether the original debt is extinguished or not. But most clearly this is not law, says Mr. G. for the promise is collateral if the debt or duty is not extinguished. Original promises must conform to the rules already laid down. Hamb. 330. 3 Burr. 1887. 2 Wils. 94. B. N. P. 281. 2. Salk. 201

It has often been supposed that if there is a consideration & a promise is made it takes it out of the Stat, but clearly this is not law, says Mr. G. for the promise is collateral it would be repealing the Stat. the Com. law being so before the Stat. was enacted. A bare consideration will not take a promise out of the terms of the Stat. if it would afterwards come within it, but the Stat. never supplies the want of a consid. 2 Wils. 94. B. N. P. 281. Ro. Abr. 332.

It has been decided in Conn. that a written promise to pay the debt of another if the Debtor does not pay, is discharged upon the promissee, by granting forbearance to the debtor, this is a promise by way of additional security. Kirby 397.

We would here observe that when the promise is original & common action is general indeb. assump. is the proper one to be brought. But when the promise is collateral & in writing, the proper action to be brot, is Special assumpsit stating the whole case. Indeb. assump. is not proper in this case, for the promissor is merely a surety or an insurer of the debt & is not treated as the debtor. Burr. 373. 3 Burr. 1685. 3 Lev. 365. Ld. Ray. 1085. Ro. Abr. 216. And it seems to be a general rule, that where an action is brot on a parol promise which is within the Stat. & a judicial confession is made by the Deft. supersuding all necessity of other proof - this will take it out of the Statute. - Peakes Cases. 15. Ro. Abr. 238.

Contracts.

Where according to the distinctions already taken the contract must be in writing, still it is not necessary to aver in your decla. that it is written. The Statute has introduced a new rule of evidence, but has not altered the Com. Law rule of pleading. It is sufficient then that the Pl. shew the written promise in evidence & hence the same rule of declaring, before the Stat. is good still. Suppose a collateral promise made before the Stat. this was good tho by Parol., if there was a consideration. 1 Ray. 450. B. N. P. 279. 3 Burr. 1890. R. Co. 158. 202.

This rule holds good in all cases contemplated by the Statute. 12 Mod. 640. Cowp. 289. 2 Wils. 146. vs. 140.

If then one sues on a collateral promise & does not allege it to be in writing, 'tis good on Demurrer, for this amounts to an acknowledgment that the promise is written. 7 T. R. 350. note. 12 Mod. 540. 4 T. R. 355. Cow. 289. R. Co. 77. 2 Wils. 146.

It is difficult to ascertain in what way & how far the foregoing rule will apply in Con. If we consider our demurrers as confessing a written promise it would at the same time prevent any inquiry into the consideration; for all our written arguments are specialties. Our Court ought to adopt one of two modes; they ought to say, in such cases as this that written instruments shall be treated as simple contracts which is the English mode; or they ought to say, that it should be averred in the Declaration, that the instrument is in writing and that demurrer does not confess the written promise. Our Court of Errors, in one case, seems to incline to the English mode, but there is no settled rule upon this subject.

First all tho when the Pl. declares upon a promise which is within the Stat. & is written, it is not necessary to

allege that it is in writing; yet when Defe. pleads such contract in bar to another action, he must allege that it is written; & the the reason is that more certainty is required in a plea in bar, than in a declaration. - Thus suppose A brings an action ag. B. and B. pleads in bar that he on sufficient consideration & with consent of all parties undertook to pay this debt & has tendered the money to A. - Now this is a collateral promise & the plea in bar is insufficient & not good according to the rule, for Defe. should have plead that C's prom. was in writing. B.N.P. 279. Ray. 450. 2 Wilg. 49.

But tho' it is not necessary to aver that the promise is in writing, yet it is necessary in all cases within the Stat. that the declaration should shew & allege a good & sufficient considera-tion. 7 T.R. 350. - Roberts 202.

If one part of an entire promise is within the Stat of frauds & perjuries, the whole promise is vitiated & void. a parol contract whereby A promises to pay the debt of B. & do something else is void in toto; if part is vicious the whole is so. 7 T.R. 201. New R. 130. Robt. 112. 17. notes. This rule is established on the ground that an entire contract cannot be apportioned. 2 Wms 223. Smith Ch. N. 410.

III. The third class of contracts required to be written by the Stat. of frauds &c are agreements in consideration of Marriage. This must be in writing & signed by the party or his agent. Now this clause of the Stat. does not relate to a promise of marriage, but it relates to family settlements or family provisions. Ld. Ray. 386. Stra. 24. B.N.P. 280. P. Wms. 618. P. Ch. 526. Pow. C. 277. 13 Ves. 65, 411. Fonb. 179.

It was formerly held, that a parol agt. that the trusts of a marriage settlement, should be reduced to writing was sufficient to take it out of the Stat. But it is now settled otherwise & that it must be reduced to writing in the first place. Stipulating to do it is not sufficient. 1 Pow. C. 279. P. C. Ch. 406. 3. Atk. 304.

If however it is stipulated that the parol agt. shall be reduced to writing, & it is prevented by fraud from being done, a Ct. of Eq. will in such case enforce the agt. Eq. Ca. ab. 19. 2 Ch. Ca. 136. 198.

But a parol agt. by way of marriage settlement does not bind; still there is a sufficient consid. to support a settlement made afterwards, it is the same as if executed before mar. & as a parol promise by way of settlement b. fore mar. is a sufficient consid. to support a written promise made after mar. the written promise is supported by the parol one made before mar. and Eq. will decree a settlement, pursuant to the written promise. 2 Ld. Ray. 1476. Stra. 236. 2 Ves. Jr. 196. Roberts. 1976. 203.

As to what amounts to an agt. in writing, it is settled that a letter signed by the party to be bound, is a writing within the Statute. i.e. the form of the writing will not be objected to, for it may be defective in other particulars. P. Ch. 560. 3 Atk. 503. 2 Ch. Ca. 32. 3. Dr. 318. 1 Vern. 179.

When one has received a letter, on which he relies or defends, it must appear that the party accepted the terms of the letter & acted in contemplation of those terms in solemnising the marriage, otherwise it is not binding. Thus, where the father of the intended wife wrote a letter to her, saying he intended to make a settlement on her after marriage, but this letter was not shewn to the intended husband till after the marriage, & upon the husband's bringing a petition in Chy. Chancery refused to decree a performance, for he did not marry in contemplation of the terms of the letter he being ignorant of them at that time. 2 P. W. 65. 9. Mod. 3. Ton. 1. 179. 93. Peer. 6. 282.

It is also necessary that the letter promise distinctly the terms of the agreement, this is true of all agreements whatsoever, as covenants, &c. P. Ch. 560. Stra. 426. Atk. 12. Ton. 6. 179. 3. Atk. 503. Roberts. 121.

IV. The fourth class of contracts contemplated by the Statute of

Contracts.

Frauds & perjuries are those contracts for the sale of lands, tenements or hereditaments, or any interest in or concerning them. Such contr. must also be in writing & signed by the party or his agent. How far things annexed to the realty, as timber, grass &c. come within the Stat. I shall notice hereafter.

Under this clause of the Stat. it has been supposed that a parol agt. would bind, if it was part of the contract that it should be reduced to writing; but this is not true, it must be reduced to writing in the first place. — Ves. 151. 9. Eqt. 19. P.W. 370. P.C. 402. 2 B.C.C. 555. 65. 10 Ves. 139. 9. 118. C.C. 48.

A question has arisen in Conn. whether a parol promise to pay for the land sold was within the Stat. It has been decided by the Superior Court that an action of ind. assump. would lie for the recovery of the consideration of lands sold, by DEED. But the Court of Errors afterwards decided that an action of ind. assump. would not lie in such case. But they did not say that an Express promise would not bind. Nicol (see top of opposite page for cases)

It appears to me, says Mr. G. that this question has nothing to do with the Stat. of Frauds &c. & that this parol promise to pay the price of land will bind as much as a parol promise to pay for one yard of cloth; for this promise does not affect the title of the land, & no evidence ought to be introduced to contradict the deed. — —

Parol agt. made at the time of the deed shall never afterwards be introduced to contradict the deed. So a parol promise to refund if the land falls short or to pay more if it exceeds such a quantity; & this on the principles of the Com. Law, viz that parol evidence shall never be introduced to contradict a deed. This has nothing to do with the Stat. of Frauds. I conceive, says Mr. G. that the our Courts considered it within the Stat. of Frauds

this decision was correct, the their reasoning was inapplicable to the case. - Hays Cases 23. Root 77. 4 J.J. 73. Kirby 22.

I have laid down the general rule that contracts for the sale of Lands, ought to be in writing & signed by the party or his agent. But there are some exceptions to this rule under the Stat. for there are some parol agts. respecting the sale of Lands or for the sale of Lands &c which are good in some cases, the Statute notwithstanding. A parol agt. respecting the sale of Lands &c is binding on the party if provable consistently with the spirit of the Stat. & the rules of evidence. For there is no inherent inhecility in a parol contract for the sale of Lands; it is as good as a writen one in itself, & the only difficulty lies in the proof, which difficulty is introduced by the Stat. The Stat. has introduced a new rule of evidence merely, for the purpose of preventing fraud thro the medium of perjury. Therefore it is said that where there is no danger of perjury or fraud in proveing a parol contract concerning Lands &c the contract is not within the Stat. & binding of course. Hence it is said in a bill for a specific performance of a parol contract respecting Lands &c if the Deft. in his answer confesses the parol agt. he is bound by it, tho he pleads the Statute. Pow. C. 272. 292. Ves. 221. 441. Pre Ch. 208. Am. C. 586. P Ch. 374. 3 Atk 3. Blk. 600. 2 Bro. P. 568. Pre Ch. 374. 2 Atk 100: 155.

The foregoing doctrine or rule has been much controverted as I shall shew hereafter. But whatever dispute there may be as to that, if the Deft. charged in the bill confesses in his answer that a parol contract was made & on its to plead the Stat. such parol promise will bind him. This is settled. 2 Bro. Ch. 586 4 Ves. J. 23. Ves 64 136. 161. Pow. Con. 292. -

So also if the Deft. expressly submits to the decree of performance

performance, he is bound by it as much as if the contract had been reduced to writing; for he confesses the contract & does not insist upon the Statute. This is also well settled. 1 Ch Ca 156.-

Now these two cases, which I have mentioned go to establish the contested case above mentioned. These cases prove that a parol contract respecting land is not void, but only that the Stat. prevents the introduction of parol proof, to guard ag. fraud & perjury, so that the difficulty made by the Stat. is only in the mode of proof.-

If the Plff. in the bill alledges that the contract is in writing & the Deft. does not plead the Stat. in his answer, the Plffs bill will not be supported by parol evidence. It is clear therefore from this case that if Deft. does not throw any obstacle in the way of the parol agreement, it is good. Roberts 156.

The question still recurs as to the correctness of the general doctrine just advanced, viz, whether a parol contract is good & binding when there is no danger of fraud & perjury the Stat. notwithstanding. Thus suppose Deft. in his answer admits the parol agr. & pleads the Stat. also. Now can the Stat. be enforced in such case? This seems to be an unsettled question in Eng. as there are respectable authorities on both sides.

Lord Hardwicke said he would decree a performance when the Deft. pleaded the Stat. provided he confessed the parol agr. in his answer. Now this decision went upon the ground, that if it could be satisfactorily shewn to the Court that there was no fraud or perjury in this parol contract, & also that if there was no danger in the mode of proof, of the admission of fraud &c such agreements ought to be enforced. 3 Atk. 3. 2 Ves. 155. 2 Bro. Ch. Cy. 568.-

Lord Mansfield was of the same opinion, viz, that if the Deft. confessed the parol contract, it is out of the Stat. 29. 12. 600.

Against this doctrine there has been a decision, in the Court of common pleas, where it was said, by Lord Loughborough that a confession by the Deft. of a parol agt. does not bind him & that he may plead the Stat. to avoid such agt. 2 W. Bl. 63. 4 Ves. J. 23. 2 Bro. Chy. 563. 4.

Lord Loughborough, Lord Roslyn, & Lord C. J. Eyre are of the opinion that this admission by the Deft. of a parol agt. does not take it out of the Statute.

Again in another case the Deft. did not deny nor confess the parol agt. but plead the Stat. & Lord Thurlow said that he was not bound by the agreement, & that it was within the Stat. — but he gave this opinion on the particular circumstances of the case then under consideration, for there did not appear to have been any express agreement. 2 Bro. Ch. J. 559. 67. 8. 9. & 3 Bro. Parl. Cas. 45.

Roberts is inclined to the opinion that the Deft. is not bound if he confesses the parol agt. & pleads the Stat. Rob. 160. 14. J. 238. Ford. 170.

I think says M. G. that the Cts. ought to establish one of the two opinions, viz, either that the confession of the Deft. amounts to nothing at all, or else that his confession binds him notwithstanding he pleads the Stat. For upon one of these rules is established the Deft. can avoid these parol agreements or not, as he pleases, which amounts to this, that Equity will compel a Deft. to do an act if he pleases & not otherwise, now this is absurd in the extreme. Ford. 168. 70.

There is another question extant, viz, whether the Deft. in Chy. is bound to confess or deny such parol agt. It has been decided by Lord Mansfield & Lord Thurlow that he was bound to do one or the other, as there are decisions the other way also. Rob. 157. 66. 4 Ves. J. 24. Mich. P. Chy. 2 Vern.

Upon examination of the Authorities, say M. G. I find a favor of the doctrine, that a parol contract will bind tho the Stat. is pleaded Lords Mansfield, Thurlow, Hardwicke & Mansfield, who are of opinion that the Deft. is obliged either to confess or deny the parol agt. in his answer.

answer. I am clearly of the same opinion, says Mr. Gould.

Opposed to both of these doctrines, stands Lord Loughborough, C. J. Eyre & Ld. Ch. One of these Judges, opposed to the doctrine, gives a reason why the Deft. ought not to be bound, tho he confesses the parol agreem't that the Deft. is liable to commit perjury. Now I answer, says Mr. Gould that this is no reason at all, for it would apply as a reason with equal force, in any case where the Deft. is put upon his oath in Ch'y, & furthermore the object of the Stat. was to prevent the Pltff. from proving a contract by perjury & not to prevent the Deft. from avoiding a contract. This is the only argument I have ever seen on this side of the question and this is of no weight at all in my opinion says Mr. Gould. — 4 Vis. p. 54.

A solution of this latter question will determine the former, for it is clear if he is bound to confess or deny the parol agt. that in such case a subsequent plea of the Stat. would not avail him. Rob'ts 160. Ford. 171.

There are one or two cases, in which the Cts. have been over liberal in taking cases out of the Stat. & which are not law; it has been decided that the Deft. was bound by his agt. if he had confessed a parol agreem't had been made, out of Court, i.e. if he made the confession out of Court so that this would bind him. Now this, clearly, is not law. 3 Atk. 407. Pc. 293.

Agreements for the purchases of lands, at a public auction, before a Master in Chy, under an order from the Court may be enforced. Because the Master acting under his oath of Office, it is supposed there will be no danger of perjury or fraud. This is another example in proof of the doctrine, before advanced, that the difficulty lies merely in the proof. 1 Ves. 218. 20. 176. 188. 289. 1 Bro. Chy. 334. Rob'ts 115. 1 Pow. C. 271 & notes. And it has been decided that a verbal contract, made by the Solicitors in a Suit, between Mortgagor & Mortgagee, shall be specifically executed. 2 or 3 Bro. Chy. 334. Roberts 115. note.

There is a strong analogy between this & the case before considered, where the Deft. confesses the bill. In the judgt. of the Court there is

no danger of proving these contracts by parol, because in one the Deft. by voluntary confession supersedes the necessity of proving the contract at all, & in the latter none, for they are proved by officers of the Ct. acting under oath.

Parol contracts respecting the title of land or the sale of land are many times inseparable from circumstantial facts, & if there is no danger of fraud or perjury in proving these facts, such parol contracts will bind. I know of no judicial decision to this point, but authorities are numerous. This you will observe is not proving the terms of the contract, but an independant, collateral fact.

So where an absolute deed is given circumstances may be admitted (as e.g. where the vendor remains in possession, payment, taxes &c.) to shew that the intention of the parties was, that it was to be a mortgage and redeemable at some future time. 3 Mod. 322. 1 Salk. 60. Pow on Mo. 65. 1 Atk. 20. 1 Atk. 291. 1 P. Wms. 526. 2 Vern. 376. 1 Vern. 424. —

This precise case, of a Mortgage, came before our Ct. of Superior Ct. adopted the rule as to circumstantial facts. But the Ct. of Errors reversed the decision. Still says Mr. S. the construction of our Statute ought to follow the English construction, & the decision of the Ct. of Errors was not law. Again, there is another exception, on the ground that a Statute made to prevent fraud, ought not to receive such construction as to promote it. And it has been found necessary to consult the spirit of the Statute.

When therefore a party by not performing a parol agt. would produce a greater fraud upon the other party, than would result from a fulfilment of the agreement, such party is justly holden by such agt. in a Court of Equity. 1 Bro. C.C. 600. Pow. C. 294. 6. 7 Vern. 171. 2. 294. 1 Ch. Ca. 131. 8. —

When therefore a parol agt. for the purchase of land is performed or partly performed on one side at the request or with the consent of the other party, his other party is bound. Thus if A leases land to B. for

twenty years by parol, B. enters upon the land, builds or begins to build & makes improvements &c & all this being done by consent of A. – A shall be compelled to perform the contract. for otherwise he would profit by his own wrong. 1 Ford a. 172. 3 Atk. 100. Stra. 783. Pre Ch. 561. & see also authts below. So if, on a parol agt. for the purchase of land the vendee pays the consideration money or part of it the vendor is compellable in a Ct. of Equity to convey the land on the ground that part performance takes it out of the Stat: 2 Atk. 100. 1 Ves. J. 341. B. R. 600. Ver. 159. 1 Ves. 221. 2 Ver. 373. 619. 3 Ves. 378. 3 Wood. 433. 35. 9. mod. 37. Bro. Ch. 47. Bos. & Pul. 397. Pow. 209. see also authts above cited. –

Chy have gone so far in one case as to decree a performance when there was no precise proof of the terms of the parol contract. Now as a general rule this want of certainty or precision in a contract has been considered as an objection to a specific performance of it. Certainty is necessary. Pow. 297. 5 Vin. Abr. 523. 2 Eq. Ca. Ab. 48. note. Lib. Reg. 1. 131. 28. (Skinner v. Pow. 309. not well founded, says Fonb.)

As to what shall be considered a part performance, so as to take the contract out of the Stat. a delivery of possession by the person according to the terms of the parol agt. has been held a sufficient performance, for this act is to his injury. 2 Ver. 368. 455. P. Ch. 518. Stra. 993. 1 Bro. Ch. 409. 1 Ves. Jr. 34. – and it has been holden that taking possession by vendee in such case is sufficient notice to subsequent purchasers of the existence of such contract so that such purchaser by parol, will hold agt a subsequent purchaser tho his contract was in writing, agreeable to the direction of the Statute. Ver. 365. 2 Ves. 363. Pow. C. 302. –

Earnest does not take the contract out of the Stat, i.e. the payment of earnest; for this is not done in pursuance or performance of the contract but is merely a solemnity for the purpose of completing it. It is in substance no more than the vulgar practice of shaking hands upon the making of a bargain. 1 Ch. Ca. 560. 1 Ves. Jr. 220. 1 Pow. C. [illegible]

A question has been agitated whether a pay. of money by one

in part execution of a contract can be proved by parol? This appears to me says Mr. G. to be no question at all. It certainly can be proved by parol; for were it in writing it would then be a note or memorandum & consequently the Stat. would be complied with. Again the payment of money is a collateral act & it is never expected to be proved in any way except by parol, & further the Stat. only requires that the contract should be in writing, it says nothing about proof of this kind by parol. 3 Atk 4. Pow. C. 309. Rob. 153. 4.

When one party become bound by part performance of a contract his representatives after his death are also bound. 3 Atk 2 or 4. Pow. C. 309. Rob. 300.

The act done in part execution must be such an one as would prejudice the party claiming in execution of the agreement, unless it were entirely enforced. So if A. should make a parol agt. with B. to purchase land of him, & A. should pay part of the consideration money & should afterwards refuse to pay the rest, now B. cannot compel A. to pay the residue & take the land. 7 Ves. J. 341. 6 Bro. Ch. Cas. 45. Rob. 138. 162.

It is also necessary that the act claimed as done in part performance must be such an one as in the opinion of the Ct. would not have been done, but with a view of part performance. 3 Atk 4. 2 Vern. 330. Ch. 561. Atk. 12. 1 Bro. Ch. 412. 2 Dr. 561. Amb. 586. Pow. C. 309.

With regard to the nature & kind of acts which amount to part performance the two foregoing rules are the criterion, for it is a general rule that an act merely introductory to a final execution of the agreement is never considered an act of performance within the rule; thus to go & view the land, survey it, consult counsel upon the subject &c are no acts of performance, unless it be strictly in performance of some part of the agreement. Pow. C. 309. 1 Bro. P. Ch. 45. Bro. Ch. 412. 3 Ves. 34. 3 Q. 6 Dr. 41. Rob. 139. 140. 162.

It is to be observed that marriage articles between the parties will not take the marriage settlement agreement out the Statute. Pow. C. 561. P. Wms. 561. Stra. 238. 1 P. Wms. 611. Rob. 146. 8.

2 Vern. 322. 1 Bro. 175. 3 Atk. 715. 4 Ves. 720.

But Contra it is said that a parol contract between third persons in consideration of mar. between A & B. is taken out of the Stat. by the mar. if so it is with the consent of the third person. Thus if the father of the intended hus. makes a parol agt. with his son, that he will make a settlement of an Estate in consid. of the mar. he will be bound to the contract if the mar. takes place; because if he were not obliged to perform there would be fraud practised upon the wife. Whenever a non performance of a contract between A. & B. will work a fraud upon a third person it will be enforced; & whenever the execution of a contract between A & B. will work a fraud upon a third person it is absolutely void. 2 Ves. 373. 2 Freem. 204. 1 Bro. C. 298. 2. 1 Vern. 297. 1 Bro. C. 304.

The cutting down of timber upon land that was to be settled on the marr. has been held to be a sufficient part performance, if done in pursuance of the agreement. 2 Eq. C. ab. 29. 1 Pow. 304.-

Our Court of Errors have decided both ways as to part performance taking contracts out of the Stat. But our superior court have always holden that part performance does take a contract out of the Stat. as in England.- 2 Days Cases 225 Kirby 393 or 399.- . . .

I have now considered two classes of cases which are taken out of the Stat. 1st Where there is no danger of Fraud & perjury & 2d. part performance. — — — — — —

Again a written agt. respecting lands &c may be contradicted by proving the parol agt. if there was fraud in the execution of the written instrument. Thus suppose A agrees to convey to B. blackacre & B by fraud gets A to sign a deed conveying whiteacre parol proof is inadmissible to shew the fraud. 3. Atk 389. 1 P. Wms 620. 2 Atk 203. 1 Eq. C. ab. 4. 23. Pow. 6. 294.

A parol contract for the sale of lands &c may always be proved when the Cont. is only inducement to an action of fraud, because you cannot explain the fraud to the Jury unless you shew how it originated. Stowe & Bulkley. 2 Day 531.

So also a parol agt. tho within the Stat. may be proved for the purpose of obtaining relief agt. an instrument, when there is a mistake in the execution of the instrument. It must be a mistake in the execution of it strictly, for a man cannot take advantage of a mistake in law unless there was fraud practised. A mistake in the execution, is a mistake with regard to the contents of the instrument. As if a man intending to convey to B. 100 acres of land & signs executes to him an instrument binding himself to convey a deed for 1000. he may shew the parol agt to relieve himself. The Schoolmasters mistake Mr. G. thinks was a mistake in law. 2 Atk. 203. 3 Dr. 389. 6 2 Ves 3 & 8 a. 386. 6 J. R. 671. 10 Ves. 4 S. 7. 2 Ves. 386. 1 Ton. & 188. 193.

So also a written agt. concerning lands &c may be controlled by parol agreem^t for the purpose of rebutting an Equity. As if A agrees to sell land to B for so much, tho' this is in writing & the vendor afterwards agrees by parol to take less than what is specified in the instrument, now this agt. may be proved by parol. 2 Ves. 3 99. 10 Vers. 240. This rule applies only in favor of a D. & Pl. in a bill of Equity. The rule goes upon this ground that as the interposition of a Ct. of Eq. is to make performance specifical- ly they will make use of the parol agt. upon the ground that it is dis- honest to have a written agt. enforced contrary to a subsequent one by parol. The Ct will not nor can they set aside the written agt. but they will leave the parties where they find them. 2 Ves. 299. 10 Vers. 240 Ton. & 294.

By Stat. III Geo. 2. the action of indeb. assumpt. will lie for use & occupation upon a parol lease. Whether the lease be longer or shorter will make no difference; it will lie upon a quantum valebat. Thus if I tells B. you may enter upon my farm & occupy it, for 5 years paying 100 £ per year. B agrees to it. on the trial the Pltff is allowed to give in evidence the parol agreem^t in order to get the real value of the land; the action is not founded on the parol agt. This action lies in some cases in Comp. tho we have no Stat. to this effect. Esp. di. 153. 2 B. & P. 12 & 9. 1 T. R. 3 & 8. 1 Wils. 314. 1 H. B. 325 or 2. 35. 8 Mod. 307.

* Or if not the party is bound to pay what the land is worth.

But possession of the land must be with the consent of the owner in such case there must be a contract either express or implied. 1 T.R. 378.

At common law assumpsit will not lie to recover the rent of land but debt will lie upon a parol lease at Com. law, for it is said debt is a higher remedy. Hutton 34. Doug. 234. Esp. di. 20.

In Com. a parol lease does not create a tenancy at will, nor a tenancy from year to year, it creates no tenancy at all; it is a mere license & will excuse a trespass, but it does not excuse a contract from being carried into effect, i.e. enforced, if there is no danger of fraud & perjury.

V. ..... Contracts of the first & last kind under the Stat. of frauds & perjuries are those which are to be performed within one year from the time of making them; such contracts must be in writing; thus if A. promises B. to pay him a sum of money 2 years hence, this contract to be binding must be reduced to writing. The object of this is to prevent perjury or mistake.

This clause of the Stat. operates something like a Stat. of limitation. tho it is not strictly such, because it does not limit the time in which actions may be brought.

It has been thought that this clause does not extend to any Cont. respecting Lands tenements &c and the reason is that the preceding clause has made all necessary provisions. So that if A & B. should enter into a contract respecting Lands &c which was not to be fulfilled within a year & a day or within 2 years, now if there is a part performance in this case, it is out of the Stat. This clause now under consid. does not affect it. 1 Vern. 189. 1 P. Wms. 276. 8 T.R. 327. 1 Ves. 89. Bun. 6. 276. There are not many authorities to this point, & Mr. G. thinks it somewhat questionable.

It is well settled that where in the terms of the contract the performance is to take place upon a contingent event, which may or may not happen within the Year, it is not within the Stat. Thus it is good. E.g. if the owner of a Ship promises to pay money upon the return of his Ship from India. the Cont. is good. Salk. 280. B.N.P. 280. Stra. 506. 3 Salk. 9. Ld. Ray. 316. 1. 673.

Contracts.

A parol promise to pay A a sum of money on the day of mar. is not within the Stat; or to pay money on the death of promisor's father, for these are contingencies, which may happen in the course of the year. Skin. 353. 1 Ld Ray. 318. 1 Bl R. 187. So also a promise by one to leave another a sum of money in his last will is not within the Stat. 3 Burr. 1278. B. & P. 280.

To make the cont. binding, it is not necessary that the contingency should happen within the year; for it is good ab initio; reference must be had to the state of things at the time the contract was made. 1 Salk. 28. 3 Burr. 1281.

This clause of the Stat. then, extends only to those contracts which according to their express terms are not to be performed within one year from the making. 3 Burr. 1281. & it has been decided by our Superior Court that even contracts of this description are not within the Stat. if made upon a continuing or accruing consideration, provided it is within a year after the entire consideration becomes complete.

So a parol contract to pay for board for 5 years, is not within the Stat. for the consideration is continually increasing or accruing & the rule is the same if it is to be paid within one year after the total consideration has accrued. 1 Esp. R. 89. But a contract in this case to pay for 5 years board at the end of 7 years is within the Statute.

I shall now mention some rules which apply to the different class of contracts, contemplated by the Stat. generally.

The rule of construction of these Statutes is the same in law as in equity & this is true of all the Statute laws; but the remedy is different in the different Courts. The intention of the Legislature governs both Courts. 1 Bl. R. 600. 4 Wend. 227. 3 Bl. R. 430.

Under this general head an enquiry arises what is a note, memorandum &c. under the Stat. With regard to these words Mr. G. says any writing which is intended to furnish the terms of the contract is a note, memorandum &c. within the Stat. B. in agreement is writing

meant any thing which expresses the intention of the parties to a formal description of the terms of the contract.

But a note or memorandum is sufficient to bind the parties altho' there is no formality about it. Hence, as has been observed, a letter written by one of the parties to the other is a sufficient note to prove and this other party acted in conformity to such letter. Also a letter written by one of the parties to his agent is a sufficient note within the Statute. 1 Ves. sen. 179. 3 Atk. 503. 2 Bro. Cha. 32. 3 Bro. Ch. 318. 1 Ver. 201. 2 Ves. 32 n. f.

But it is said that the letter must furnish distinctly the terms of the contract, this is true; & so it is of a writing in any form, the terms of the contract must be stated. Pre. Cha. 560. 1 Atk. 12. Show. 4. 26. 2 Eq. Cas. Ab. 7.

But where upon the face of the note &c all the terms of the contract are not certain; yet it is sufficient if they can be made certain by reference to other documents, or its extrinsic facts, which of themselves are certain... As a covenant to convey land according to the custom of a certain manor is good, for this custom can be ascertained. also if the agreement was to convey lands for the same sum as J.S. had before given for it; here reference may be had to the former deed. 3 Bro. Ch. 318. 2 Bos. & Pul. 238. 1 Ves. Jr. 330.

But when the writing refers to something extrinsic, & the subject is not made sufficiently clear by the thing referred to, parol testimony cannot be admitted to make it more clear. As if on a conveyance, reference is had as to the quantity of the land, to a former deed, & no quantity is there expressed, no parol evidence will be admitted to prove the quantity. 1 Ves. Jr. 326. 1 Ves. Jr. 108.

But the letter is a good note &c within the Stat. yet it is necessary that the party claiming by it should shew that the other party accepts the terms of the agt. & that he acts upon it; else there is no agt. for there is no assent. 2 Peere. Wms. 65. 9 Mod. 3. Fonb. Eq. 2 Pow. 89. An acceptance in writing signed by one of the parties containing the terms of the agreement is a sufficient note by within the Stat. 1 Ves. Jr. 509. 3 Ves. Jr. 191.

Contracts.

It is now well established that the consideration as well as the stipulation of a contract must appear in writing. This was decided upon the particular phraseology of the Stat. which says that the agreement thereof must be in writing, i.e. it must appear for what the thing was sold, else there is no agreement. There is however one exception to this rule, which is where goods are sold to the amount of 10£ and upwards. I mean this is an exception under the English Stat. ours know not this exception. Here it is sufficient if the contract appear without the consid. it may be proved by parol. 5 East 10. 6 D. 307. Rob. 116 1/2.

You will observe that there is no technical form in writing agts. to satisfy the Stat.. Hence an instrument intended as a deed failing to operate as such may be enforced in a court of Equity as an agreement in writing. So under our Stat. omitting a witness or failing to get a deed acknowledged may be enforced as an agreement, tho' it cannot operate as a deed.. Equity will make use of [illegible] contracts. 2. P. Wms. 142 or 242. 1 Rob. 109.

An agreement must import the privity & assent of both parties. Hence an entry made in the book of the Steward of the manor, is no evidence of a lease or agt. between the Lord & this tenant. 1 or 3 Atk. 497. Rob. 109.

Thus far as to enquiry, what amounts to a note or memorandum within the Statute.

As to what constitutes a signing within the Stat. it has been decided, that not only a subscription in the usual form, i.e. at the bottom of the instrument is sufficient, but also the name of the party, written by the party himself, in any part of the instrument, if intended to give authenticity to it, is sufficient signing. This must be accepted by the other party. Thus, if A. B. agree to sell a tract of land to C. D. this is sufficient. 2 Eq. C. ab. 32. 3 Atk. 508. 3 Ves. 167. Ves. 6. 1. Wils. 118. 1 Pow. C. 333. Stra. 349. 9 Ves. Jr. 249. 2 Bos. & Pul. 238. Ves. 6. [illegible]

But it is otherwise if the name written in the body of the instrument is not intended to give it authenticity, but merely to explain the stipulation &c. - Here the insertion of the name is not signing, as e.g. this instrument witnesseth that I A.B. will convey land &c. this is not good signing. 1 or 2. P.Wms. 771. 1 Vern. 166. 1 Pow. C. 285. Roberts. 121.

It was formerly supposed that the parties making an alteration in the draft of the instrument, with his own hand, was sufficient signing. But this is now overruled. 1 Ver. 121. 1 Vern. 165. 1 Ro Abr. 121. Pow. C. 285. P.Wms. 770.

Signing the instrument as a subscribing witness, the witness knowing the contents of the inst. is a suff. signing to bind him to the stipulation on his part. e.g. Marriage articles were entered into between A & B, reciting that the Mother of A. was to advance 1000 £ to B. on the marriage & the mother signed as witness, the Ct. held this a suff. signing, because she gave authenticity. 1 Ves. 6. 1 Vels. 318. R Abr. 123. Pow. C. 284.

And it is sufficient if the party agt. whom the contract is to be inforced signs it, even tho the other party does not. But it must be shewn that this other acquiesced in the contract, & was privy to it. 1 or 2 Bro. Ch. 564. 2 Ves. Jr. 351. 2 Ves. 373. Eq. C. ab. 20. 2 Vern. 32. 2 Ves. Jr. 265.

Thus if A. procures B. to sign an instrument & A does not sign it himself B. is bound, & some opinions have gone so far as to hold, that A. who procured B. to sign is himself bound, because the signing by one's procurement is equivalent to signing by one's self. M. C. is unable to discover on what principle this opinion is founded. Eq. C. ab. 11. 21. 1 Pow. C. 257. If however one, of two parties, who does not sign, brings a bill for a specific performance, then he is bound, for he virtually affirms the agt. as to himself. 1 Ves. 82. R Abr. 124.

An auctioneer signing the name of the highest bidder, to the printed conditions of sale, has been determined to be a suff. signing, & will bind the owner of the goods & the bidder. There

There are several opinions, that auctioneer signing highest bidders name, will bind the parties, whatever property be the subject of the sale, whether Lands, or personal property. But there are two or three cases that deny this as a general rule. Some modern cases say it holds to all. 1 Bl. R. 599. 3 Burr. 1921. Bull. N. P. 280. 4 Bos. & Pu. 269. This authority says the rule is general. Contra 8 J. R. 151. 16 J. R. 107. 1 Bos. & Pul. 306. 12 Wh. 344.

It has been doubted whether an auctioneer's sale, whatever be the subject of them was contemplated by the Stat. But it is now settled that they are not. Bull. N. P. 280.

A printed name may be & in many cases is a sufficient signature, as where a trader has his bills or notes printed or engraved & gives them out; here the printing &c is by his procurement & therefore adopts them as his own. 2. Bos. & Pul. 238. Rob. 124 or 134.

And tho it is necessary that the agreement be signed by the party or his agent, yet it is not necessary that the agents authority to sign be shewn in the writing. 3 Wood. 427, 32. 4 Bos. & Pu. 251. Win. ab. tit. con. let. H. 45.

It is not necessary that the identical Cont. stated in the bill or declaration be signed at all - provided the agreement is acknowledged by another instrument, as E.g. a letter &c written by one party stating & acknowledging the agt. wrote. This is a sufficient note, memorandum &c. 3. Bro. Ch. 318. 3. Atk. 303. Rob. 21. or 121.

The bare writing of an agreement with one's own hand, does not dispense with the necessity of signing, as was formerly supposed. The Stat. requires that the agreement shall not only be in writing, but also signed. 1 P. Wms. 770. Rob. & Holt. 121.

Heads of
Frauds & Perjuries. Sept. 28. 1813.
Hon. Jacob R.

Contracts

Interpretation of Contracts.

Sept^m. 29. 1812.
Lecture 8th.

It is to be observed that the object of construing or ascertaining contracts, is to find out the intention of the parties; & however the contract be expressed they cannot be carried beyond their intention. 1 Pow. 6. 370. 1.

As Courts of Justice are unable to make contracts for the parties, so are they equally unable to make any part of a contract. 3 Inst. 146.). 2 Roll. 425.

But on the other hand, contracts are to be carried to the full extent of the parties intention, if the words of the contract can be construed thus. as where A created a trust out of the profits of his land, for the purpose of raising a certain sum of money; it was holden, by construction, that the land might be sold, if the money could not otherwise be raised out of the land. 1 Pow. 6. 372.

The words or terms of the contract are to be construed according to the known signification of those words or terms, unless there are some decisive reasons to the contrary. Plow. 169. Pop. 55. 2 New^R. 6. 213. 1 Pow. 6. 373. 5 6.

It has been holden, if A. sells B. 20 casks of cider, the interest in the barrels does not pass, but the contents only. But if A. sells B. a cask of wine he also parts with his interest in the barrel. The rule in such cases is, that the construction must follow the intention & practice of the parties & the usages of sale. Pow. 86. 1 Pow. 6. 374.

If one makes a lease for twelve months, the lessee holds for twelve lunar months; if for a twelve month he holds for an entire year. This rule of construction is adopted from the supposed intention of the parties & the common law. 2 Bl. C. 141. 6 Co. 61.

Words expressive of quantity are to be construed, as they are understood at the place where the contract is made. In Eng. the denomination of a bushel is different in different counties; & if A living in the

County

of Norfolk, contracts with B. living in the county of Middlesex to pay & deliver him, in the county of Norfolk 100 bushels of wheat, the quantity is to be delivered according to the Norfolk measure. But M. G. thinks had the contract but to have delivered the grain to B. in Middlesex County, the quantity must have been delivered according to the denomination of a bushel in that county.

But if money is to be paid, it recieves its value at the place where it is payable. thus if A promises in London to pay B. 100 £ in Dublin, it must be paid according to the Irish currency. Shep. touchstone 172. 2 Ptns. 590 on 6. 1 Pow. C. 376. 407.

If the language of the Contract is ambiguous, the intention of the parties may be inferred from the subject of the contract the effect the circumstances. Thus where the grantor covenants with the grantee for quiet enjoyment of his term generally; all that he or her intends is a covenant against all persons who claim by title, & is not subjected for the acts of the wrong-doer, or the trespasser, or for any wrongful interruption of the lease. - Cro. J. 425. 1 Ro. C. 212. Stra. 200 on 400. 3. T. R. 584. 4 D. 619. 4 Co. 80. - and -

It has been determined that if A. grants to B. all the trees growing upon his land, the fruit trees growing in his garden & orchard are not included, if there are other trees upon the farm. But if the fruit trees are all the trees upon which the grant will operate they will of course pass. 1 Pow. C. 378.

And for the purpose of giving effect, rather than a contract shall entirely fail, it is a rule that an instrument in one form may operate as an instrument of another form of an entire different species. Thus if one of a number of Joint-tenants executes to his Co-tenant, a deed of enfeoffment, it shall be construed as a release. For the Joint Grantor had not the fee in himself & therefore could not grant it, but all the co-

tenants

interest the grantor had in the land will pass to the grantee.

So if a creditor covenants with his debtor never to sue him it is considered as a release of the particular debt only. 1 Ray. 182. 2 Jans. 46. Cro E. 352. 1 Salk 574. 1 Vent 246.

It is a general rule, that if in construing a contract according to the ordinary meaning of the words, will render the contract ineffectual or frivolous, a different construction may be put upon them. Thus words of condition are construed as words of limitation frequently. 2 Bl. C. 155. Cro E. 205. 3 Lev. 211. 1 Vent. 202.

If an Annuity is granted in consideration of service to be done by the annuitant or grantee the grant is construed to be conditional. as if A. grants an annuity to B. for 10 years, upon consideration that B. will serve him that time, there the annuity is construed to be conditional, depending upon B's service, altho there are no words of conditionality used in the grant. Noy 14. 1 Pow. C. 383. and -

If A grants an annuity to B, pro consilio dando, for giving counsel, & the terms in the grant are thus general; yet the construction put upon it is, professional counsel. As if A grants an annuity to a Lawyer, pro consilio, it means counsel in the line of his profession; if to a physician, it means professional counsel, i.e. medical. Here the intention of the grantor is considered. - 1 Pow. C. 385.

It has been determined that if one has goods in his own right & also goods in his right as Executor & grants all his goods; those he possessed in his own right merely, will pass. Cro E. 705. Litt. Ley. Sec. 535. 6. 3 Mood. 278.

Where there are particular recitals in a release, & general words follow, those general words will be qualified or restrained by the particular recital. As where A had a judgment against B. for 1000 £. & B. on his death, bequeathed A. a legacy of 500 £. & on the receipt of

of the legacy, & did a receipt for the same & closed in these general words "in full of all demands" this was construed to extend to the discharge of the legacy only. 1 Eq. C. Ab. 170. Cro. J. 170. Ld. Ray 235. 2 Lev. 269. Carth. 119. 3 Mod. 277. —

But where the release expresses the receipt of a particular sum, but does not recite a particular claim the general words are not thus restrained. — As if A. owes B. 100 £ & B. acquits to him a receipt for 5 pounds "in full of all demands" such receipt was holden to discharge the whole debt in a case decided by Com. Bt. of Errors, in the case of Brace & Catlin. Carth. 119. 1 Show. 155. 3 Mod. 277. Contra 2 Roll. 409. this case Mr. H. says no law.

If after the application of these particular rules the contract still remains doubtful, it is to be construed most strongly agt. the party bound. The reason is the words used are his, & it is his own fault that the contract was not more clearly expressed. 3 Co. 6. Plow. 140. 161. 171. 289. Co. Litt. 19. a. 167. b. —

An exception to this rule. When there is an ambiguity in the condition of a penal bond, — in this case the construction is most favorable to the obligor. The reason is, the law wishes to discharge him from a penalty which it abhors. Dyer 17. 5 Co. 22 a. 23. b.

Upon the same principle if one binds himself in a penal bond conditioned for the payment of a sum of money at a certain feast as Michaelm as &c & there happens two of the same feasts in the same year, he shall not be obliged to pay till the last. Dyer 17. a. 1 Pow. 6. 297. 8. — But had there been a covenant to pay a certain sum of money, as in the above case, it would have been due at the first feast unless the intention of the parties was otherwise.

If one is bound in a penal bond to make an estate to another according to the advice & prescription of A. and A. prescribes an unreasonable mode, which is complied with by the obligor, the penalty of

saved, tho the bond itself is not discharged. 5 Co. 23. b. Park. sect 775.

To this rule there is an exception, where the application of the rule will work an injury to a third person; thus where tenant in tail makes a lease for life, without naming whose, it shall be construed to mean his own life, otherwise it might work an injury to anter vie. 1 Inst. 42.

Subject to these rules, the words used are to be construed in the most comprehensive sense, in which they are generally understood. Thus a warranty, q.e. all men, shall be construed to mean all persons whether men, women or children, or man woman or child. 1 Pow. 400.

An indefinite expression is construed as an universal one, unless there is some manifest reason for restraining it. Thus if A. seised owns divers horses & makes a grant of q.a. four horses, all the horses in which ie. horses will pass, altho 2 horses are divers. Pow. 400. 1.

When legal terms are used in a contract, they are to be understood according to their legal acceptation. Thus a limitation to the heirs of A. so long as he shall pay a certain sum of money, has been held due to extend to all the heirs of A. to the latest generation. Wms. doubts the propriety of this rule. The word heir is used merely to determine the quantity of interest A. takes in the Estate; & he says, it is manifestly a word of description, descriptio personae. 2 Roll. 253. 18 Ves. 6 & 10 2.

Where one covenants to satisfy all embezzlements committed by an apprentice, upon request & due proof made, it was determined due proof must be legal judicial proof. Hob. 199.

Contracts are to be construed according to the general intention appearing in the whole context, although this should be opposed to particular words in the contract. Thus upon covenants with lessee that he had made no lease to any person by which he should be defeated and a stranger entered & did defeat lessee, it was holden lessor was not liable. 1 Lev 240. 6 Mod. 43. 6 Mod.

Contracts.

It is a rule, if the thing stipulated for is not done or delivered according to contract, the price the thing bore at the time specified for the performance or delivery, shall be the rule of damages.

Exceptio. Where the article has arisen in value after the time of performance, its increased value at the time of trial shall be the rule of damages. The following are authorities for the general rule. 6 Mod. 81. 2. 1 Vern. 217. 1 Eq. C. ab. 221. 3 Stra. 406. 2 Burr. 1010. For the exception see 2 East. 211. 2 Burr. 394.

But if the article falls in value after the time specified for performance the purchaser will recover the amount at the time fixed for performance, for he might have availed himself at that time & not been a loser.

If several deeds or other instruments are made at the same time, between the same parties & for the same object, they are to be considered as part & parcel of the same contract, & are all to be construed when ever a construction is to be given them. 2 Burr. 518. 1 Peer. C. 410. on 415.

Contracts.

Of the Annulling, discharging or waiving of contracts.

Sept^r 30. 1812. Lecture 9th.

Until the terms of a contemplated contract are accepted, on both sides, it is not consummated either party may retract his offer. 3. T. R. 653. 1 Pow. C. 334.

But an offer on side, accepted by the other, becomes a cont. so that either by tendering performance according to the terms of the agreement will bind the other. Here is the assent of both to one & the same thing. Hob 41. 2 Bl. C. 447. Thus, if A. offers B. 20£ for his horse, & B agrees to accept so much, A. by tendering the money, or B. the horse will bind the other. But upon A's offering 20£ for the horse; before the acceptance by B. A. may withdraw his offer. 2 Bl. C. 447. 2 Bac. 241. Hob 41.

So if upon an offer accepted, earnest is paid, or a future time is fixed for performance; the contract is complete & the property is bound. 1 Vc. Bl. 363. 7 T. R. 64. Ag 42. 2. Bl. C. 447.

But if upon the offers being made nothing more is done, i.e. no payment, no tender, no earnest, no delivery or no future time for performance is fixed, & the parties separate, the contract is at an end & neither party is bound. As if I offer a man 20£ for his horse, in the street, & he accepts it. the understanding is that I am to pay him the money down, & he there to deliver the horse, but if we separate under the circumstances, neither party is bound. 1 Pow. C. 231. 2 Bl. C. 447. Plow. 302. 9. 2 Vc. Bl. 316. 1 Vc. Bl. 363. ...

Suppose on the acceptance of the offer, the purchaser pays the money, or tenders it. the owner is bound. Suppose the owner of the horse tenders him, the purchaser is bound. Suppose upon the acceptance a future time is fixed for performance of the contract, both will be bound if either party performs or tenders performance at that time. or if earnest is paid both are bound & the property is changed.

The question may occur, how is the property bound at a future

fixed for performance? The reason is, the time of performance is part of the terms of the contract, which has not yet arrived.

But if A agrees to sell goods to B. at a certain price, provided B. within a limited time, gives notice to A of his willingness to take the goods, here in this case A is not bound at the time, gives the notice within the time specified, & the reason why A is not bound is, because B. is not. The contract is reciprocally obligatory or not at all so. This is a very important rule in the law of contracts, & one not generally understood even among our Mercantile class of citizens. The one case in which this principle is judicially decided is, 3 J. R. 653. 1 Pow. 261.

Tho' it may be necessary to premise thus much before I enter upon the particular inquiry of this lecture, viz. how contracts may be annulled &c.

It is a rule, that before a right of action has accrued to either party upon a simple contract, the parties may rescind it, by expressing their mutual dissent, & this may be by parol. No right having accrued, by this mutual dissent no rights is destroyed. The continuance of a part must be until one has a right of action. As if A. offer to B. to pay him 100$ for his horse a week hence, & before that time the parties meet & mutually agree to rescind the contract, this agreement does rescind it. Com. dig. tit. Pleader 2 G. 13. 1 Bl. R. 136. 2 Lev. 194. 1 Wood. 159. 12 Mod. 538. 1 Pow. C. 4. 12.

But on the other hand after the time specified for the performance of the contract has arrived & a right of action has accrued to either party, this right or cause of action can't be discharged but by deed, i.e. a writing under hand & seal. For now after the right has accrued the assent of the parties is out of the question. 12 Mod. 538. 1 Bl. R. 136. Cro E. 384. 2 Mod. 64. 1 D. 259. Now it is very true that such right of action may be discharged by a parol contract executed as accord & satisfaction, but with this subject I have now nothing to do; it is sufficiently treated of under its own head, i.e. accord & satisfaction.

There is an exception to this rule; as in the case of a bill of exchange accepted; for here the acceptor may be discharged by parol as well after as before the right of action accrued. But this is a positive rule in conformity to the Law Merchant, & therefore does not militate the general rule. 1 Lil. on R. of Ev. 334. 1 Doug. 235. 267. Esp. di. 47.

But tho the general rule is, that an agreement cannot be discharg. by parol after a right of action has accrued; yet a contract may be waived in Equity by a long omission to claim under it. Thus where a Landlord & tenant made an agreement, which lay dormant for twenty years, the Ct. of Equity decided that neither were bound. This rule proceeds upon the ground of mutual waiver. 2 Eq. C. Ab. 207. 4 Mod. 2. 3. 2 Bro. Par. Cas. 116. 1 Pow. C. 413. 14. 20. 21. So also where there was an agt. between intended husband & wife, that she should hold her property to her own separate use, during coverture, & the hus. received the whole profits while the coverture lasted, Equity refused her relief agt. the hus. representatives upon the ground of waiver; tho it was said, that if it had appeared she was dissatisfied with her husband's taking the profits, the presumption of waiver would have been rebutted & she entitled to relief. 2 P. Wms. 82. Sim. 409. 1 Atk. 269.

And a contract consummated & even executed may be rescinded, & that by one of the parties, if there was a provision in the original contract to that effect. Thus where A. sold B. a horse with a proviso, that upon the happening of a certain event (as the payment by B. might return the horse, & the event takes place & B. accordingly returned him, it was holden that B. might recover back the money. For this is part of the contract. It is a defeasable agreement, which may be always rendered null upon the happening of the contingency. 1 Ld. R. 135. Comyn. 318. Doug. 23. 7 Ld. R. 201. 4 Bro. P. C. Pal. 351. 2 East. 145. 3 Esp. R. 152.

last

Contracts.

But, according to Powel, if A contracts with B. for property & the price to be ascertained by third person, the parties can't annul it, because they have put the perfection of the contract into the hands of a third person. But, says Mr. G. I can't conceive this to turn upon any principle whatever. For all they have done is to appoint J. S. to arbitrate for them, & it would be very singular if they were unable mutually to revoke the power mutually given. But Powel seems to suppose they have parted with all their free agency to this 3d. person. - 1 Pow. C. 413. 16. He cites Bacons Maxims 91. -

Altho, after a right of action has accrued it can't be discharged but by a release under hand & seal, yet it may be discharged by what the law terms a tacit release. - This is by cancelling, burning, or otherwise destroying the contract. - 1 Pow. 416.

Again, if he for whose benefit the contract is to be performed prevents the performance of the party bound, he is discharged. Thus, suppose A. in consideration of 1000$ agrees with B. to build him a house, & at the time of performance B. will not suffer A. to come upon the land, or in any other way hinders A. from performing, A. is discharged; because it is not the fault of the party bound that he does not perform. - 8 Co 91. 2. Co Lit. 206. Cro E. 374. 1 Pow. C. 265. 416. 420

In the above case the party is in the same condition, i.e. the party who is prevented from performing, as to his own right, as if he had actually performed. He may recover the consideration, i.e. 1000$.

So also if A. make a conveyance to B. upon the condition that if A. pays a certain sum of money to B. on or before such time, it shall be void," & the day stated B. is out of the realm, so that A. is unable to pay on time, yet his title shall be vested. Inst. 210. b. Yet in this case it is not to be understood that Mortgagor is to lose his money.

A contract may also be annulled by a new contract of a higher nature; for the same thing; because in such case the lower is merged in the higher contract. As if A. is indebted to B. on book which debt is reduced to a bond, A can never sue in assumpsit but the law compels him to resort to his higher security. So also if A is indebted to B. on bond which is sued & judgt. recovered in favor of B. - B can never resort to his bond for he has now a debt of record. - 6 Co. 44. Dyer 21. b. Esp. di. 164. 1 Burr. 9. 3 East 251.

Now the reason of this rule is two fold - one is the party ought not to have but one remedy, the other, the intention of the parties in such case is not to furnish a two fold remedy, but merely to substitute a higher for a lower security. - But if A owes B. a debt & b. gives a bond to secure the payment, the Creditor may still sue the simple contract, i.e. he may still have his remedy against the original debtor. The bond is executed merely to increase the responsibility & this is manifestly the only intention. Dyer 230. b. Pow. 423. - -

But tho a contract of a given degree may be merged in one of a higher, yet it can't be extinguished by one of the same degree. The only effect of this is to give the creditor his choice, on which to bring his action. - Thus if I buy a horse to day with a promise hereafter to pay, & next hour run off that promise, the former promise is not merged in the latter. 1 Burr. 9. Cro. J. 579. Cro E. 57. 81. Chit. on B. of Ex. 62. - And upon this principle if one is indebted to another for 100£ by parol, & afterwards gives a promissory note for the amt. by the com. law the parol promise is not merged. It is otherwise in Comm. But if one executes a promissory note to another & afterwards gives a new one in full satisfaction of the former, it is merged 5 Co. 117. Stra. 426. 3 East 25. 1 Sel. N. P. 136. —

Contracts.

October 1st. Lecture 10th.

I observed yesterday that a contract of a lower nature might be merged in one of a higher, but when a cont. of a lower nature is inserted in one of a higher by way of recital, or to corroborate it, or to enlarge the remedy, the former is not merged. Here the higher is not substituted for the lower. Thus if one makes a bailment by deed, an action of detinue will lie; or in this case, if A acknowledges the receipt of money by deed of B. to account for; this receipt does not deprive B. of his action of account. The intention of the parties in both these cases is not to turn a simple contract into a Specialty. 1 Bac. Ab. Tit. a. 118. 2 Bulst. 256. 6 Co. c. 644.

A contract by deed cannot be discharged or annulled by parol, it being a maxim of law that a cont. must be discharged with the same solemnity, with which it is made. Neither will parol evidence be admitted to contradict a deed. By deed is meant a writing under hand & seal. 6 Co. 44. Yelv. 192. Cro. J. 254. 2 Wils. 86. 376. 1 Saund. 291. n. 1.

And it is said that a contract by deed is not cancelled or annulled, by being delivered up to the party bound, provided that the party can regain inspection of it. But I do not know, says Gould, how far this rule extends. If the deed is delivered up to be cancelled I think it is forever gone. But if this is not the intention of the parties, it is still good. Thus obligee may make obligor the bailee of the bond. Cro. J. 99. 2 Roll. R. 110 Palm. 110.

According to the strict rules of the com. law, even payment or accord & satisfaction does not discharge the bond. But this rule does not amount to much; for tho' payt. does not discharge the bond, yet it is a good discharge of the money due upon it. It seems to be merely a nicety necessary to be observed in pleading. For although you can't plead payt. in discharge of the bond, you may in discharge of the money thereon specified. Cro. J. 524. Yelv. 192. 2 Mod. 144. . . . . Upon

Contracts.-

Upon the same distinction a plea of accord & satisfaction in discharge of a covenant is not good; but a plea in full satisfaction of the damages, is good. 6 Co. 43. 4. Cro E. 96. Cro J. 659. Yelv. 125.

When the right & the obligation of a contract unite in the same person, the cont. is discharged at law; tho the party entitled will have remedy at Equity. Thus if obligor to a bond becomes Executor to obligee's estate, & by this means comes into possession of his bond; at law there is no remedy; for if it was sued, the action would be brot by the obligor agt himself. But those claiming under the Estate may file a bill in Eq. & they will decree payment. 8 Co. 136. Salk 300. 2 Pow. C. 244. 5 Mod. 67. 10 Mod. 515. - There has been a contrary decision in our Ct. of Errors which case is reported in 1 Day 256. But since that time there has been a trial in the Supreme Ct. & they decided according to the English principle.

The rule is in effect the same in the case of the intermarriage of the obligor & obligee. Here neither can sue the other on account of the unity of persons; the rights & duty are in the same persons. 1 Pow. 438. 9. 444. But this rule is not universal as between debtor & creditor intermarrying. As if a bond or other cont. is made in contemplation of marriage to be determined after the coverture is at an end; this obligation is good at law or Equity. I do not here speak of contracts, which are to be executed during cov. - Thus if intended husband gives intended wife a bond that he will leave her certain prop. at his death, when the right of action accrues it may be enforced agt his representatives in either Court. Lord Kobart contra. Hob. c. 216 Cro J. 571. Salk 235. 1 La. Ray 515. 5 T. R. 351 & 381.

A contract may be discharged by an act of the Legislature. I do not here mean a special act of insolvency, but a general law which renders the performance unlawful. - This principle does not

upon that clause of the Constitution of the United States, which says no law shall be made impairing contracts &c. Thus if A. one year since had entered into a cont. with B. to export Arms to Great Britain, the declaration of war discharges A upon the contract. 2 Salk. 198. 8 Mod. 51. 2 P. Wms. 218. ---

A cont. may be discharged by the act of God or any inevitable accident, which renders performance impossible. Thus if Lessor covenants with Lessee to have all the timber growing upon the land, he is not liable for such as are blown down by a tempest. 10 Mod 268. 1 Co. 98. - So also if A bails a horse to B. which is to be returned in a limited time, & before that time the horse dies, B. is discharged. Palm. 548. 1 Pow. 447. 8. ---

Again if A. covenants to serve B. one year for a certain sum, which sum is to be paid by half yearly installments, B. the Master dies between the expiration of the 1st & 2nd installments, B's Executor is not liable for the second installment, for the contract is entire & cannot be apportioned i.e. the inst. can't be divided. 1 Pow. 448.

I will now mention a case, which may appear irreconcilable with the foregoing principles. It was also a case of undertake of covenant between. The case is this. A. covenanted with B. to sail his Ship from Eng. to South Carolina, by a certain time; but on account of Storms of weather he was unable to reach the port by the time, & an action was brot for breach of the covenant, it was decided (in K. B. of King's Bench) that he was liable. But, say you, how is this case to be distinguished from the one I have above cited, of the Lease being blown down? Both the obligors in these cases failed in performance by the act of God. The distinction is this, A in this case upon himself the risk of the voyage upon himself the express stipulated for his own act merely. So also in the case of the bailee of the horse. on the cov^t broken. This case is reported in 3 Burr. 1500 Todd.

But a contract becoming partially impossible must still be performed as far as possible. This rule was traced out under the head of municipal law. As if a lease is made for a longer time than the law allows, it is good for so long a time as the law admits. So also where A covenants with B. to convey to him a certain farm, by a certain time, & before the period arrived part of the land was engulphed by an earthquake - the Ct. held him bound to convey the residue according to his covenant. Plowd. 284. Pow. & P. 448.

If one binds himself by bond to convey lands by a certain day, & before the arrival of the day he dies, the penalty is saved, because performance is rendered impossible by the act of God. Yet a Ct. of Equity will compel the heir to convey. 1 Eq. C. ab. 18.

But the act of a stranger can't regularly annul or vary the contract. Thus if A. gives a bond, conditioned that B. shall appear in an action on 8 days notice, & if he does not thus appear he A. will pay the bond; now if B. voluntarily appears on 6 days notice, A is not liable; for this is not according to the terms of the contract. 1 Pow. 451.

When however the contract is by the terms of it to be void or annulled by the act of a third person, here the act will have its effect. Thus if A agrees to purchase goods of B. & to pay 2 s. as much as J. S. shall determine, here A is bound to pay the price J. S. gives. Tho if in this case J. S. refuses to act the contract is annulled. 1 Pow. 415. 16.

There is a very important question, upon which eminent Lawyers differ; it is this -

"When one makes a conveyance to another, with an intent to defraud his creditors, & the grantee of this conveyance conveys to a bona fide purchasor, is the conveyance in the hands of the bona fide purchasor void as against Creditors? This question has been decided in Conn. at the last Court, Six Judges against three. Judge Reeve's opinion is in these words, "I would observe before I consider the point in controversy directly, that on my purchase of another without any intention to aid him in any fraudulent purpose of the seller, when he conveys intending thereby to defraud his Creditors; yet in this case the conveyance is not void in the hands of the purchasor, for there was no secret trust that can be presumed between the Grantor & the Grantee. The question then is, when there is a fraudulent design in the Grantor so to dispose of his property, as to defraud his creditors, & the grantee receives it with a view to aid in the design, is such conveyance void against creditors in the hands of a bona fide grantee of the fraudulent grantee? The obvious meaning of the words of the Statute, which declares all such conveyances to be utterly void against Creditors is, that as to creditors the grantee has no title; but the Estate remains in the grantor, liable to his debts, & such has ever been the understanding of all men. If the grantee has no title against creditors, it would be natural to conclude that he could convey none against creditors. It must be admitted, that in ordinary cases it is so, that is, that a person having no title cannot convey any; the maxim "quod non habet non dabit", is a maxim of general applicability. Some persons even that

there are cases where a title may be conveyed by one who has none, which I will presently notice; but they all stand on grounds very distinct from this question, & the reason of those cases bears no analogy to this. When we give a construction to a Statute if we find that such construction will probably defeat the object which the Legislature had in view, we ought to be very jealous of it; nay I lay it down as a sound rule, that it is not the true construction; no facility to evade the object which the Statute had in view to accomplish, ought ever to be admitted. The object which the Law had in view cannot be mistaken; it doubtless was to prevent persons conveying their property into the hands of another, believing whom & the grantor there was a secret Trust that the grantee should have the benefit of it at the expense of Creditors, by which means it was designedly withdrawn from being a fund to satisfy creditors, & converted into a fund to support the debtor — according to the rule laid down, the construction, that the fraudulent grantee can convey a good title to the bona fide purchaser, will tend to defeat this object of the Law. Such conveyance will not be good, that it will, I think is clear when the grantor and the grantee are combining to defraud the Creditors of the Grantor, knowing that while the property remains in the hands of the grantee, that their dishonest purposes will be frustrated if the fraud is discovered. there will be in many cases no difficulty in finding a real bona fide purchaser, & in many others, one apparently so, and all this as part of the plan entered into to accomplish the fraud & defeat the Law; the Law it seems to me is made in vain, if such an evasion of it is to be sanctioned by the adjudication of Courts.. Again, I apprehend it will not be

found, that when the words "utterly void" or "void to all intents and purposes" are used in a Statute, that ever such a construction has been given as to validate grants, conveyances, or sales &c. in the hands of a bona fide purchaser, provided there exists a claim of any person against such grantors sale, in the hands of the first grantee, obligee or promisee. Hence it is that when promissory notes are infected with usury or gambling, altho negotiable in the hands of a bona fide Holder, are of no avail agt. the claims of the maker. It is impossible to conceive a stronger case than this, for here is not interposed the claim of a third person, who had in no way contributed to the conveyance, but the maker himself, who was party to the wrong act, who had put the note into market, & had contributed to its negotiability. This was a determination in a commercial country, where every nerve is strained to give effect to a note in the Hands of a bona fide holder. Why then was not such a note holden good against the Maker? Surely it would have been, if it had been possible; for the claims of equity, & the still superior claims of Policy seemed to require that it should have been held good against the maker. But the truth is, & so it appears from the declaration of Lord Mansfield, it was impossible. The words of the Statute were too strong. it was made void "to all intents & purposes", & policy, great as was the opposing policy of commercial regulations, required that no such construction should be given as would defeat the object of the Law; for in this case, as in the case before the Court, if the maker of the note & the promisee contrived to evade the Law of usury, it is but for the maker to execute a negotiable note to the promisee, and then the

promisee to negotiate the note. If this note becomes valid, the usury is purged & the Statute ceases to have the least effect. The policy of the Law, which was to prevent such a transaction from being a valid transaction will never suffer such an evasion to defeat its provisions; & this, altho there seems to be no equity on the part of the maker & great equity on the part of the holder, must all yield to the superior equity of general Justice, which declares such transactions to be void. It is a much stronger case to induce the Court, than the one now before them to give effect to the transaction; for in this case, altho it resembles the other in this, that it is declared to be "utterly void" as against creditors, which is surely as strongly expressed as in the Statute of Usury which is "void to all intents & purposes", and nothing can be more void than to be "utterly" so. for in that case it is void "to all intents & purposes", to give effect then to the grant of the fraudulent Grantee in the hands of the bona fide purchaser would have the same effect to defeat the provisions of this Statute, as it would be to defeat the provisions of the Statute of Usury, to give effect to an usurious note in the hands of a bona fide holder. Ld. Mansfield found it impossible to give effect to such by reason of the said Statute; for the same reason he would have found it impossible to have given effect to a conveyance from a fraudulent grantee to a bona fide purchaser. But there is in point of equity this marked difference in favor of the present decision that the person attempted to be injured by the fraudulent grant has in no measure contributed to the fraud & has no hand in promoting the conveyance. In both cases the equity of the bona fide purchaser is equal.

But on that of the Promissory note, the matter has no equity, whereas in the case of the fraudulent conveyance, the equity of the Creditor is equal at least to that of the purchaser for he has trusted the Grantor on the credit of his Deed. which is by the conveyance attempted to be withdrawn out of his reach; and this was the equity which the Stat. meant to protect: if therefore, in a case governed by similar principles, & where the claim of the party that the bona fide holder should not be postponed against his claim, as the equity is not so great as the claimant in the present case, we find the Law distinctly laid down that the bona fide holder must yield to the superior force of the positive declarations of the Statute; surely then in the case a fortiori it must be a successful analogical argument that the claim of the bona fide Grantee of the fraudulent Lessee must yield to the superior force of the regulations of the Statute against fraudulent conveyances.

I have heard it said that on every principle the equity of the bona fide purchaser is as great as the equity of the Creditor, so that even upon the hypothesis that such purchaser has no title, neither has the Creditor any; and being in equal equity & the purchaser being in possession such possession should not be disturbed. The answer to this is, admitting the equity to be equal & one in possession, yet, possession against the claims of another avails nothing if the other's claim is older in point of time; no maxim of Law stands on firmer ground than this "qui prior est in tempore potior est in jure" and this maxim always without any exception from its universal influence, settles at once

the opposing claims of all, who without legal title, have equal equity. The claim of the purchaser was unknown long after that of the creditor existed; by claim I do not mean any specific lien created on the thing conveyed, but only that equitable right which every creditor has to the property of his debtor, that it shall not be taken from him by a fraudulent contrivance between the grantor & the grantee; which the law considered to be a right of sufficient magnitude to protect agt a fraudulent conveyance; and this right must have existed prior to the purchasers claim, for if it has not, there could not have been a fraudulent conveyance. The advocates of the purchasers claim contend, that the creditor has no specific lien on the property conveyed, so that the Debtor might convey the whole to a bona fide purchaser, & such conveyance (it is not pretended) can be impeached, that the fraudulent grantee stands in the place of the Grantor, & that whatever the Grantor might do, the Grantee having all the rights of the Grantor, (for the conveyance is good against the grantor) may also do, (and as the Grantor may convey to a bona fide purchaser & the conveyance is valid, while the property conveyed is withdrawn from the reach of the Creditor, so the Grantee may convey to a bona fide purchaser & it will be valid while the property is withdrawn from the reach of Creditors, and by this means no greater injury is done to the Creditors than when the debtor himself conveys. I apprehend that a fallacy lurks beneath this reasoning. When a Debtor conveys his property to a bona fide purchaser, he is not by this means disabled from

paying his debts it probably will be the means of enabling him to pay his debts with greater facility; there is no presumption that he has the least intention of fraud or that his creditors will be injured thereby; and as the creditors has not secured any lien on the property, the Law never intended to prevent the debtor from selling his property, always presuming that he meant to deal fairly with them. All that can be said in this case is that it is possible for the debtor, with more ease, to defraud his creditor when the property is sold and converted into cash, than when exposed to view; but the Law does not calculate upon any such possible case of fraudulent intention, but always presumes the contrary. Upon the supposition that the debtor is unwilling to pay his honest debts after having conveyed away his property for a valuable consideration, he is not on that account the less able to pay & the Law is always open to the Creditor to enforce his claims, & the remedies provided by Law must be presumed to be abundantly sufficient to enforce them; if the property is not liable to be taken being sold, the body is liable to be taken on a Ca. Sa. & holden until payment is made, which the Law presumes will be made to procure the release of the body. How different is the case when the fraudulent grantee conveys to the bona fide purchaser. The debtor is by this fraudulent conveyance utterly disabled to pay his debts, for he can have no demand on his grantee for the purchase money. no fund is created to enable him to pay his debts. the fund of the fraudulent grantee is indemnified, & all this at the expense of the creditors without giving any possible chance of realizing any thing from them

debtors property. The object of the Statute was to prevent the property of the debtor from being conveyed away fraudulently out of the reach of the creditors; of this there is no danger when it is an honest conveyance by the debtor himself, The Law would not calculate against this; but when the property is fraudulently conveyed away & then by the fraud is conveyed away to another, the very thing which the Law meant to prevent is accomplished - the creditor is defeated of any effectual remedy, & therefore the Law is calculated against such an event & deems such conveyance invalid. The two cases are so far from resembling each other, they are in direct opposition - In the one case no right of the creditor is affected or endangered; there was no presumption of law, no fraudulent intention to defeat Creditors of their claims, but an honest intention to satisfy them. In the other the object was to defeat the creditors claims & by the conveyance of the fraudulent grantee to a bona fide purchaser, this object is accomplished; the very thing which the Statute intended to prevent takes place, & a conveyance to a bona fide purchaser by the fraudulent grantee is now in valid.

I have heard an argument suggested to avoid the force of this reasoning, which appears to me so wholly unfounded in principle that I should not have noticed it, as it was not urged by the Counsel in the argument of the case, was it not that the seeming equity attending it may possibly induce some to believe it worthy of consideration; it is that to secure the rights of the creditors & also of the bona fide purchaser, the fund ought to be considered as the purchase money in the hands of the fraudulent Grantee belonging to

to the Creditors, & that the same may be recovered by the exec-
tors out of his hands - that in fact he has become debtor to the
Creditors for so much money received to their use. It is impossible
to conceive how a creditor is to obtain his debt from the grant-
ee, in the event of the assets being insufficient to pay all the
debts. Is he liable to the Creditor who first sues for his whole
debt, or is the Court to go into a settlement of the claims of all
the creditors & strike an average, & order just so much for the
average sum? But it is decisive that the Grantor & Grantee
can never compel a creditor to change his debtor by any
thing which they can do. - It is contended it is analagous
to other well known cases to some. The bona fide purcha-
ser - it is compared to a sale in Market Overt. - Sales at vend-
ues - by the Sheriff - or currency obtained by right or fraud
& passed to others, for in none of these cases has the seller any
title to the articles sold, & yet the purchaser is protected. All
these cases & every other which is governed by the same princi-
ples are Exceptions to the rule "quod non habet, non dabet",
but to an attentive observer they will not appear to have
any analogy to the case before the Court. These are all ca-
ses in which the purchaser is protected, not on account of his
superior equity; for the man who purchases a stolen horse in
market overt has no greater equity against the original pro-
prietor of the horse, than the man who innocently purchases
of a thief at private sale - the purchaser has paid his mo-
ney in both cases, & if the horse is reclaimed by the original
proprietor he must lose his money in the latter case & in
the former he will not. We must then look to some other
principle which governs in the excepted cases than argue

by

to A. equity of the purchasers case, for that is as strong in the one as in the other case, & yet in one it is wholly inoperative; the truth is these cases are governed wholly by principles of Policy; they are so determined not from a regard to any private right vest from a regard to public good. The laws of the Land, which are always deemed salutary will be defeated of their intended operation, if the decisions were against the purchaser. No man would venture to purchase of strangers at a fair, or at a Sheriff's vendue, if he were liable to lose the property purchased. it would discourage all dealings among men if a man's right to currency was called in question, after having fairly received it. To prevent therefore the salutary laws of society from being frustrated in their operation, the superior equity of him who is "prior in tempore" yields to an inferior claim. But where no such reason of policy exists, I trust no case will be found, where a purchase from one who has no title has been protected from the claims of others. - B. sells to C. & he to D. - the article sold passes through a variety of hands. this furnishes no argument in the mouth of the last purchaser against the claims of A if he has title & B had none. However inconvenient it may be to disturb the possession of the last purchaser, & all intermediate sales, I think, in point of policy there is as much reason to protect the last purchaser as in the case before the Court. What Law will be defeated if the operations of the bona fide purchaser of a fraudulent grantee cannot hold his land against a Creditor, when the title of the Grantee was utterly void against such Creditor? surely none; but on the other hand the intention of the Law

against fraudulent conveyances would be often defeated, & very great facility be afforded to evade it if such conveyance should be held valid. This view of the subject I apprehend must convince every person that the cases argued from are in no respect analagous to the case before the Court.

But it is said there are cases to be found where a conveyance fraudulent in its creation may become valid by matter ex post facto — As where A conveys to B. without valuable consideration, & B. conveys to C. for valuable consideration, that C can hold this estate. The truth is that such a conveyance is not fraudulent unless there were Creditors. But the case is where A conveys to B. without consideration & B. to C. for one, & then A conveys to D. for a valuable consideration, in such case it is holden that C will hold against D. — but these are cases under the Statute 27 Eliz. rendering conveyances fraudulent, as to purchasers, void. But these cases are governed by totally distinct principles from those under the Stat. 13. Eliz. — & these are the cases — Where it is said, that what the grantee A can do the grantee B can do, so that if A had conveyed to C. for a valuable consideration & then to D. C would hold against D. — So if B had done the same by conveying to C it would be good & he would hold against D. as much as if A had conveyed to C. then to D. — in such case no right of any person is affected for B had when he conveyed the whole title; it was void as to no person then in being for there were no creditors. If there had been, it would have been void as against them whilst in the hands of B. but it is inapposite a case where there are

are no creditors. viz. B's title at the time he conveyed to C. for a valuable consideration was good against all the World, nothing can be more reasonable than thus to say "what A could have done B. might do", for no persons right could be affected by his conveyance, & when C. had obtained it with a valuable consideration he ought to hold it against B. (and here the maxim applies "qui prior est in tempore potior est in jure".

But it is said that the Statute makes A's conveyance to B void as against a future purchaser of A. with a valuable consideration. Here it will be observed that it was not void then until B. purchased, for until a purchaser appears it is good, but when there are creditors it is void in its creation against them. If this conveyance ever became void it was when B. purchased, but before that time C. had purchased of B. for a valuable consideration & B. may well be considered as standing in A's place, & what was done by B. was done by A. But where there are creditors there B. is a fraudulent grantee & has no power to convey to C. so as to effect creditors; but under the 27 Eliz. B. is not a fraudulent grantee when he conveys to C. for a valuable consideration. The cases have no analogy to each other. But what is the question is, that the Stat. by its proviso has provided that the conveyance of B. the voluntary grantee of A. for a valuable consideration shall be valid, as in the Stat. 13 Eliz. provision is made, if the grantee conveys for a valuable consideration to a bona fide grantee the conveyance is good. No matter of his motives were.

that

that he might thereby withdraw his property from the reach of his creditors, yet the grantee not being fraudulent, he should hold the property. So the Stat. 27 Eliz. after enacting that a conveyance without a valuable consideration shall be void as to a purchaser with a valuable consideration; the proviso is, that no conveyance from whom there has been a valuable consideration paid by a bona fide purchaser shall notwithstanding this act, be impeached. This proviso can relate to no conveyance but one made by the voluntary grantee; it cannot relate to the conveyance made to the voluntary Grantee, for that is not made with consideration. It cannot relate to a second conveyance with consideration by the Grantor, for in the body of the act, it is provided that such conveyance shall be good against the voluntary grantee: and it would be perfectly ridiculous to provide in the proviso that such conveyance should not be impeached, any thing in the act notwithstanding, since the whole object of the act was to validate it. It cannot then relate to any thing but the conveyance by the voluntary Grantee, providing that in such case, if the conveyance for a valuable consideration, that conveyance should not be impeached notwithstanding the conveyance to him was voluntary. The obvious language of the Statute & the proviso was this, if a Grantor conveys to a Grantee without consideration, & then conveys to a Grantee with, the first shall be void in that event & the last prevail. But in case the first grantee conveys to another, for a valuable consideration, it shall never be impeached by any subsequent conveyance by the first grantor; and nothing can be

more

more reasonable than this; for the clear intention was that a bona fide purchaser who has paid a valuable consideration should be preferred to a voluntary grantee; and this intention is as completely fulfilled when the voluntary Grantee conveys for a valuable consideration as when the original Grantor does; it may well be said, that what the Grantor could do, this the Grantee can also do. In both cases the purchaser for a valuable consideration holds; and when the voluntary Grantee conveys, the right of no person is affected by it. There is then no analogy between the cases of conveyance by the Grantee under the 13. Eliz. & 27. Eliz. for under the 13. Eliz. the conveyance by the Grantor is in its creation void as to Creditors; under the 27. Eliz. it is not void in its creation as to any person. Under the 13. Eliz. where the Grantee conveyed he had no title against Creditors, and therefore conveyed none. Under the 27. Eliz. the Grantees title when he conveyed, was good against every person, & therefore he could & did convey a title, & the Stat. expressly provides that such title shall not be impeached. Under the 13. Eliz. the object of the Stat. was to prevent the property of the Debtor being withdrawn from the Creditor by collusion. To sanction such conveyance would afford a facility to defeat that object. The object of the 27. Eliz. was that the Grantee who paid a valuable consid. sh. hold the Land. To sanction the convey.ce by the Grantee for a val. consid. wd completely attain that object."

Judge R. apprehends there has been a mistaken application of the Authorities in holding the conveyance as they refer to cases under Stat 27. Eliz. the has demonstrably seen is that the cases under 27. Eliz. Stat. are not analogous. The Authorities they rely upon are 1 Sid. 133. 1 Ventr. 243. 2 Skin. 423. 3 Lev. 387. 3 Salk. 161. Cro. J. 434. 708. Comb. 222. 49. 2 Roll. 477.

Lecture 1st.

Bailment. By Gould.

Bailment is defined to be "a delivery of goods, on a condition, express or implied, that they shall be restored by the bailee to bailor, or according to his order or directions, whenever the purpose, for which they were bailed, shall be answered". 2. Bl. C. 451. Jones on B. 3. 48.* —

Every bailment vests a qualified property in the bailee, i.e. a right superior to all others except the owner. Lord Coke made a distinction between bailee & pawnee. He said that pawnee had a special property in the thing pawned, but that bailee had no such special property. Now this is not true, says Gould, for every bailee has a special prop. tho' perhaps in some instances Pawnee has the strongest interest. — It is well settled that a common carrier has a lien on the prop. of bailor, till he gets pay for the carriage. To be sure, where the bailment is such that it may be countermanded at pleasure, the bailee has no prop. as it relates to the bailor, but he certainly has as to all the rest of the world. Nay it is settled that the finder of goods may maintain trover agt. any person, who takes them away, other than the owner, & yet prop. is essential to trover. — Do I think, says M. G. there is no foundation for Ld Coke's position? It is a qualified prop. which the finder has. 4 Co. 83. b. 1 Bac. 240. Doct. & Student 129. Yelv. 172. Stra. 505. 7 T. R. 392. —

From the bailees obligation to restore the thing bailed, it follows that he must not only keep the goods, but he must keep them safely for the specified time, & that he is liable for any loss or damage which happens, during the bailment, to them. Yet he is not liable at all events; for this would sometimes occasion great injustice. — It is a gen[e]l rule that he is not liable for loss or damage occasioned without any fault of his own. 1 Bac. 236. Jones 8. —

* The finder who delivers the goods is called the bailor, & the person delivered, the bailee.

Bailment.

Now to ascertain the requisite degree of diligence & care due from the bailee constitutes the principal difficulty which occurs under this title.--

The most general rule is that the bailee is bound to keep (or if delivered to use) or use the goods bailed with a degree of care proportioned to the bailment.--

In some cases a much greater degree of care is requisite than in others. In some cases ordinary care is sufficient, in others less than ordinary will suffice, in others more than ordinary is requisite, & in some cases, bailee is liable for loss or dam. at all events.

As to the different degrees of ordinary care & diligence. I observe that ordinary diligence is that, which rational men use in the care of their own goods of the same nature. Jones 9. 10.--

The different degrees on each side of this standard are not precisely ascertained. Where the care is greater than ordinary i.e. above it, it is called more than ordinary care. Where it does not amount to ordinary care, i.e. below it, it is called less than ordinary care. Of course much is left to the sound discretion of the Judge.--

To every degree of ordinary care there is a corresponding degree of ordinary neglect, or default. Thus the omission of ordinary care is ordinary neglect.- the omission of less than ordinary care is more than ordinary neglect. the omission of more than ordinary care is less than ordinary neglect. Jones 11. 13. 14. 30. 31.

Gross neglect is generally regarded as evidence of fraud in the bailee. But this is not universally true. As if the bailee of money should have it exposed in the open hall of his house, such this would be evidence of fraud, unless his own money was so thus exposed. For if the bailee keeps his own goods in the same gross neglect it is not evidence of fraud. Ld. Ray. 915. Jones 30 64. 5.--

Bailment.

In order to apply these general observations to particular cases it is necessary to observe the three following more specific rules.

1st. When the bailment is intended for the benefit of the bailor only, nothing more than good faith is required of the bailee. i.e. he is liable for nothing less than Gross neglect. The degree of care depends, in this case, upon the consideration that bailee derives no benefit from the bailment. The maxim of law is, he who derives the benefit of the contract ought to bear greatest risk. As if I put my goods into the hands of another, without compensation, he is liable for nothing less than Gross neglect. 2 L. Ray. 915. Jones 15. 16. 21. 22. 32. (4 Co 83b overruled.)

2nd. When the bailee only is benefitted, he is liable for slight neglect. i.e. he is bound to use more than ordinary care. The maxim in this case is the same as above. As if I lend my horse without compensation, the bailee is bound to more than ordinary care. Jones. 89. 90.

3rd. When the bailment is for the equal benefit of both parties, the burden of the risk lays in equilibrio, & it is to be equally borne. Jones 89. 90. 101. 105. — see Auth's also, before cited.

All these rules hold in those cases only, in which there is no special agreement to insure. In such case if one insures agt. all casualties by fire lightning &c. he is at all events liable for loss or damage. But they hold in those cases only, in which the law implies, from the nature of the bailment, the degree of risk to be borne by one party or the other, & where there is no special agreement of insurance &c.

October 2nd. Lecture 2nd.

Of the different kinds of Bailment. According to the common law there are 6 kinds of bailments. Some writers make but 3 others 5 divisions. I shall adopt the 6 division; because the rules of law are framed according to this division.

1st.

Bailment.

1st. — The first species of Bailment is called depositum, deposit. This is a delivery of goods to be kept by bailee for bailor without any compensation. This species is often called naked bailment; & the bailee, naked depositary, or vulgarly the naked bailee.

2nd. — Bailment of the second species is called, in Latin, Commodatum. This is a gratuitous loan of goods to be used by the bailee. The bailor is here called the lender & the bailee the borrower. It is necessary to distinguish this species of bailment from a mutuum. Mutuum is a loan for consumption, not for use. It is to be paid in property of the same species, tho the identical article is not to be restored. Thus where one lends money to another, they are called borrower & lender, but the identical pieces are not to be restored, but its equivalent in value, in any other pieces of money will suffice. It is the same in the case of provisions, wine &c. In all these cases of mutuum the absolute property of the bailment is in the borrower. And in all cases of loss the borrower is the only sufferer. — But if I lend my horse without hire, this is commodatum bailment.

3rd. — The third species of bailment is called in Law Latin locatio et conductio. This is a delivery of goods to be used by bailee for hire or reward to be paid to the bailor. The bailor in this case is called the locator & the bailee the hirer borrower. This kind of bailment is advantageous to both parties.

4th. — This species of bailment is called in Latin padium. — a pawn & is a delivery of goods in security for a debt due from bailor to bailee. The bailor is here called a pawnor & bailee pawnee.

5th. — The fifth species of bailment is a delivery of goods to be carried, or some other act to be done about or with them by the bailee, for a reward to be paid him by the bailor. Under this head is ranked the delivery of goods for transportation. So also the delivery of goods to a Tailor, or materials to a Mechanic, on which some labor is to be

to performed or bestowed. Common carriers, private carriers, Brokers, factors, agents &c come under this head.

6th. This species of bailment is a delivery of goods to be carried &c as in 5th species; but it is gratuitous; bailee here reciers no reward. 2 L. Ray. 912. 13. Bul. N. P. 72. Pow. b. 234 or 247. 1 Bac 243. For Jones' division see Jones 50. 1 89. 96. 104.

I will now proceed to treat of these different species in the order I have distributed them. And —

I. — This is a deposit, & the bailment is advantageous to the bailor only. I have before observed that the principal difficulty to be met with in this title is to ascertain the requisite care & diligence due from the bailee. The general rule applicable here is, that bailee is bound for good faith. & is therefore liable for grosp neglect only. L. Ray. 909. 13. Doct & Stu. 129. Stra 1099. Pow b. 267. 1 Vb. Bl. 158. Jones 32. 64. 5. 101. 2. See 12 Mod 87. that it is the depositary is bound by ordinary diligence, but the rule is as above stated. —

Grosp neglect is in general (tho' not universally true) prima facie evidence of fraud. The rule in this case is now well settled that depositary is liable only for grosp neglect. But the depositary is not liable in all cases for grosp neg. He is not liable at all for neglect as such, i.e. neglect in the abstract; but if liable at all it is on the account of a presumption of fraud which the law raises in the case of grosp neglect, or he is liable on the ground of violation of good faith. Thus if depositary treats his own goods of the same kind in a similar way, as he does those bailed to him, he is not liable for grosp neglect. For if he was, it would be on the supposition that he practised fraud on himself, which would be absurd. L. Ray. 650. 914. Stra 1099. 4 Burr 2300. Jones 65 6. — This rule does not apply in those cases where there is an express agreement to insure, but only where the acceptance is general 2 Ray. 911. 13. Doc 00.

Jones says there is another exception to this rule. He says if the bailment takes place by the officiousness of the depositary, he ought to be liable for ordinary neglect; for by means of this officiousness he may have prevented the bailor from giving his deliveringhis goods to a more careful man. But this distinction says G. is rather too refined, and is not recognised by any authority. Jones 67.

The old opinions are opposed to the rules now laid down. In Southcotts case (see 4 Co 83. 1 Bro C. 815.), it was holden that depositary was liable if he did not keep the deposit safely. The decision however I take to be correct & this is all. for I think there is not one correct principle of law laid down in the whole case. But it is now settled that the rule in this case is not law.

There was formerly supposed to be a distinction between a special agreement by depositary, to keep the goods safely when there was a valuable consideration & where there was none. That in the former case depositary was bound for gross neg. & in the latter not. But this distinc. is now exploded. And it is now settled that the delivery of the goods is a suff. consid. There is a solecism involved in the very supposition of such a distinction. For in the latter case he ceases to be depositum the moment he receives a reward, & becomes a bailee of a different kind. 2 Ray. 913. Doct. & Stud. 129. 2 Moo & 457. 3 Burrs Eng. Cas. 245. 6. 394. 1 Bac 241.

It is also holden in Southcotts case, that if the goods are put in to a locked chest, & the bailee keeps the key the depositary is liable only for the chest & not its contents. 4 Co 84 a. 1 Ins 89 a. b. 1 Bac 237. But this doctrine is denied by Lord Holt in the case of Coggs v. Bernard.* He says that depos. is liable, in such case, as well for the goods as for the chest, for the bailee has as much power over the goods in the chest, as the chest itself which contains them. Now it appears to

* 2 L. Ray. 909.

to me, says Gould, that neither of these rules, that generally expressed are correct. Neither of these Judges takes any notice whether the bailee is ignorant of the contents of the Chest or not, but this, I think is the true & only criterion for judging of depositary liability. If the depositary knows the contents he ought to be liable for the contents, if the bailor does keep the key; & it certainly makes no difference, whither he or bailor is in possession of the key, i.e. if he knows the contents. But contra if he does not know the contents he ought to be liable for the Chest only. For being ignorant of what its contents were, he is unable to determine what kind or degree of care & diligence is requisite for the safe keeping it. — Were not this the true principle, I might constitute a man my bailee without his knowledge or consent, which can never be done. Jones 51. & 54. L^d Ray. 914.

A bailee is considered as the insurer of goods, which are lost &c so far as the law makes him liable. Thus suppose a man obtains a policy of insurance for his Ship & Cargo, & aboard of his Ship there are articles secreted; if the Ship is lost the insurers are not liable for the secreted property.

But a special agreement in these words "to keep the goods safely" does not subject bailee at all events. It is true he is liable for his care & pains or negligence. But he is not liable when the loss is occasioned by the act of God as lightning tempests &c or other inevitable accident; neither is he liable for loss occasioned by open violence or other tortious acts, which he can't avoid. For he stipulates only for his own faithful conduct. As where one covenants with lessee for the quiet enjoyment of his term; he is not liable for the tortious acts of the dissesor. But if he insures agt. these acts he is liable at all events. L^d Ray. 910. 915. Jones 62. 3. 75. Doct. Stu. 130. Holt. 34. 1 Bro. 6. 248. 9.

If the depositary retains the goods on violation of the bailment, as a refusal to redeliver them on demand, or in any way converts them to his own use, he is liable to assumpsit on his contract to redeliver, to the old common law action of detinue, or to the modern action of trover. These actions are concurrent remedies. An unlawful detainer is a conversion. 1 Roll. 128 Cro. E. 781. 1 Roll. 128 Jones 114.

II. The second kind of bailment is called commodatum. This is a gratuitous loan of goods to be used by the bailee & to be specifically returned. This species of bailment is advantageous to the bailee only & is the reverse of the former kind. Therefore the bailee in this case, is bound for more than ordinary care, & is liable for slight neglect. Thus suppose A. lends his horse to B. to use & he is stolen from B.s stable, here bailee is liable; but it is said if B's stable door was locked he is not. 1 Pow. C. 249. Bul. N. P. 72. 2 Bac. 244. Jones 95. L. Ray. 916.

It seems to be a general rule, that if a loss happens by mere theft, the bailee is liable, unless he proves extraordinary care. By mere theft, I mean theft as contradistinguished from open robbery. Thus if he trusts the thing bailed to his servant, & the servt. purloins it, he is liable. The onus probandi lies upon the bailee. i.e. it belongs to bailee to shew that the goods were taken with such violence as he was unable to withstand, else he will be made liable. Jones 22.

But the bailee may be liable, in some cases, if the loss was occasioned by such violence as he was wholly unable to resist. As if the borrower of my horse, should ride him in the night, thro a part of the country, which he well knew was frequented with highwaymen, by thus wantonly & rashly exposing himself to be robbed, he is made liable. But it is generally true that he is not liable.

liable for open acts of violence, as robbery &c for here the utmost care & diligence is no guard against. Lofft. L Ray. 916. 1 Pow b. 251. Jones 95.

Again, A bailee of this kind is not generally liable for inevitable accidents; as lightning unjusts &c tho he may make himself so. As if I bail my horse to A. to ride to New-haven & he rides him to Hartford, where he is killed by lightning, A. is liable. For from the moment I deviate from the terms of the bailment, I cease to be a bailee in strictness. It is a breach of trust & I am a wrong doer. Thus in this case, A came into possession of my horse by his own wrong as much as if he had gone & taken him from my stable without liberty. Suppose, in this case the horse had died of a disease at Hartford; this would unquestionably go in extenuation of damages, tho he wd be liable in an action of trover, for he became liable the moment he set out for Hartford.

Again, Suppose I borrow a Boat to go to a certain point, & I embark at a time, when in all human probability the boat must be lost, I am here liable altho the loss happened thro' inevitable accident, & altho' the terms of the contract are not in the least exceeded. L. Ray. 915. 1. 1 Pow. b. 253. Jones 95. b.

III. The third kind of bailment is a delivery of goods to bailee to be used by him for hire & reward paid to the bailor. By this bailment, the bailee acquires a qualified property to the thing bailed, & the bailor acquires an absolute right to a reward or price for its use. Jones 119. Pow b. 253.

You may remember that in every kind of bailment the bailee acquires a qualified property in the thing bailed. In this case, the bailment being advantageous to both parties, nothing more is required of the bailee than ordinary care, he therefore is liable only for ordinary neglect. It is however said by Lord Holt in the

case of Coggs & Bernard that the bailee in this case is bound, for the utmost diligence, & that therefore he is liable for slightest neglect. This observation however is but a dictum of Lord Holt; the opinion is now obiter. Most clearly this opinion is incorrect, for if it is correct, there is no difference between the liability of a borrower & hirer.

Again as the parties in this case are equally benefitted by the bailment, the risk ought to be in equilibrio.

This same rule as laid down by Holt, is also laid down by Buller & Powell. Bul. N.P. 72. Pow. b. 251. This dictum of Holt is the foundation of Buller & Powell's rule. But Holt & Powell both make a distinction between hirer & borrower. L. Ray. 916.

Jones has traced this doctrine of Holts to Bracton & from Bracton to a Roman Jurist. Nay, Jones expressly denies this doctrine of Holts; so that it appears to be settled that nothing more is required of a hirer, than ordinary diligence, & that he is only liable for ordinary neglect. Hence, in such case, the hirer must use the thing hired with ordinary care; i.e. with such care as prudent men in general use such things. Hence a hirer is generally excused for losses occasioned by robbery, unless he rashly exposed them. So also if a hirer puts a hired horse into a locked stable he is not liable if he is stolen. But he is liable if the stable door is not locked. However in Lowe v. Hitchcock, says G. that the stable door's being unlocked would not make her liable, because men of common prudence do not lock their stable doors, & this is the standard to refer bailees liability. Jones 126.

There has been a question, whether a bailee, who lets a chattel for hire to be used by bailee, is bound to keep it in repair during the bailment. It is now well settled that he is not bound, but that it is bailees duty. 1 Bouv. 720 Bac 531. Sand 321.

Bailment.

Lecture 3rd.

IV.—The fourth kind of bailment is called a pawn or pledge. It is a security for a debt due from pawnor to pawnee. i.e. it is a security by delivery of goods to him. This contract of bailment is advantageous to both parties. It is advantageous to pawnor, because it gives him a credit, & to pawnee because it secures a debt. The general rule therefore is, that pawnee is bound to ordinary care & liable only for ordinary neglect. L. Ray. 917. Salk 523. Jones 105. 1 Bow. 252.

I have to remind you that in Southcotts case it is laid down by Lord Chief Holt, that pawnee is bound to keep the pawn, only with the same care as he keeps his own goods. But this is not law, for it is putting the pawnee & depositary upon the footing. (Co Litt 89. 4 Co 83.)

Pawnee is not liable for losses occasioned by robbery. When this rule is laid down, you are to understand that bailee is prima facie not liable. Yet if by his own rashness or want of ordinary care he exposes the goods to robbery, he is liable, tho he could not resist the force.

It is also holden in Southcotts case if the pawn is stolen, he is not liable. With due deference to the opinion of the learned Judge, I think, says Gould, this is a very extraordinary principle; for its truth would hardly hold in the case of a depositary, much less in this. Holts reason was, because pawnee had a property in the pawn, & therefore if he kept it as he did his own goods of the same nature, he was not liable. But Contra Sir William Jones lays down the rule unconditionally that pawnee is liable for mere theft in all cases. His reason is, that pawnee can't be considered as using due diligence if he suffers the goods to be stolen. Now I think says Mr. G. that Jones is as far from the true principle as L. Holt. The can never settle the point, whether bailee is liable for mere theft, i.e. whether he has used ordinary care or not; it is a question of fact to be tried by the Jury. But the law is fully settled, that if

if pawnee can shew he has used ordinary care, he is not liable for theft. But Jones in laying down this principle, thus unconditionally, positively contradicts himself. For in another case he says a borrower is liable, in case of theft, unless he use extra ordinary care. So you perceive he admits that theft may take place, even tho' ordinary care is used, & in this he supposes that theft cant take place if ordinary care is use.... I am therefore clearly of the opinion, that in the case of theft, it is a mere matter of fact, & that if the bailee can prove ord. care he is not liable. For Jones doctrine, see Jones 106. 7. 92. see case of Coggs & Bern. L. Ray. 918. The following Authorities leave the question as to the point of fact. Salk. 522. 1 Pow. C. 252. —

Pawnee, like every other bailee, acquires a qualified property in the thing pawned; but his interest is determined by payment, or tender of payment, of the money due, on the day appointed, and the property in the pawn is immediately revested in pawnor. 3 Salk. 258. 1 Holt 528. 2 Salk 522. Jones 112. L. Ray. 916. —

If therefore after payment, or tender of payment & refusal, the pawnor demands the goods, pawnee retains the pawn, he is a wrong doer, guilty of a conversion, & liable for any loss or damage, which may happen, even thro' inevitable accident. L. Ray. 917. Salk 523. 4 Co. 83. b. Esp di. 625. 1 Pow C. 253

But payment or tender of payment is necessary at the day appointed, for the purpose of revesting the property in the pawnor; if he does not make payment or tender of part on the day specified, his legal title is forever gone. —

And on refusal of pawnee to redeliver, after payment or tender of part, (as above) the pawnor may maintain the action of assumpsit on the promise of redelivery; detinue for the detaining, or Trover for the unlawful conversion. Cro. J. 244. B. N. P. 72. Salk. 441. —

Bailment.

The rule is the same if the refusal to redeliver, after payt. or tender of payt. is made by pawnee's servant acting regularly in pawnees business. as e.g. a Merchants Clerke. This must be such a servant as in the regular course of his Masters business would have a right to recieve the payment. Such servant by refusal to redeliver would subject his Master. Salk 441.

And a refusal by pawnee to redeliver as aforesd. is, at common law an indictable offence. This is peculiar to this kind of bailment. The reason assigned is because the delivery of the parties may have been secret. But the mere fact of secrecy does not seem to furnish a good reason. Mr G thinks the true reason is; the pawnor is supposed to be an embarrassed man, in necessitous circumstances; pawnee being the lender of the money there is great opportunity offered him to defraud the pawnor, or take undue advantage of his circumstances, & the com. laws will indict him if he should be so hard hearted as to refuse a redelivery of the pawn, after he has an opportunity to recieve his money. 2 Hawk P. C. 210. Salk. 522. Carth. 222 77 Bul. N. P. 72. 1 Bac. 240. (Salk 379. not law.)

In some cases, pawnee has a right to use the pawn in other cases he has not. This right is said to be founded on pawnors consent, or a presumption of it. Jones 112. 13.

This ~~rule of proof~~ presumption of consent is said to exist, as the pawn is likely to be made better or worse, or not at all affected by the use. I know of few things that improve by using. Jones gives one Example - As if a setting dog is pawned, he is made better by using, as it prevents him from losing his art or skill.

So where the pawn will not be injured with using, there is an implied consent by pawnor that pawnee may use it. As if the pledge consists of Jewells, rings, trinkets &c. the pawnee may use them, upon the supposition that they are not likely to be hurt by it.

he uses them at his peril & is liable for all losses as robbery &c. L^d Ray. 917. 6 Mod. 172. Salk 522. 1 Inst. 89.

The reason that pawnee is liable for the loss of the pledge, if it is occasioned even by robbery (i.e. while he using it) may readily be observed by you. I suppose it is this; that the implied permission that goods may be used that are pledged, is founded in mere indulgence of pawnor. And while he is using the pledge, he is the only person benefitted, & therefore ought to incur the principal risk.

If the pawnee is at expense in keeping the pawn, it is a rule that he may use it, for the purpose of indemnifying himself. So if Horses or Oxen are pawned they may be used. This rule is founded in justice. L^d Ray 916. Cap. de 625. Salk 522. And the rule is laid down by Jones, tho I find no where else, that the depositary may use the goods bailed, where he is at any expense in keeping them. No Authority for this rule, but M.G. thinks it a just & reasonable one.

But Contra. where the pawn is likely to be injured by use & there is no expense in keeping it, the pawnee must not use it. As if wearing apparel are pawned. L^d Ray. 917. Jones 113.

I remark generally, if the pawnee does use the pledge, in a case, in which he is not permitted, he is immediately liable in an action of Trover, & the pawnor will recover the whole value of the pawn. Conversion is the gist of the action of Trover, & this occurs three ways. viz. unlawful taking, unlawful using & unlawful detaining. No authorities to this point. But See. 5 Mod. 257.

It is said, by L^d Holt, that the distinction in relation to goods pawned, will apply in the case of goods found, i.e. that the finder of Goods is bound to keep them with as much care as pawnee. Upon the first impression, it would seem that the finder ought to be liable

liable to no more care than a depositary; because the keeping of the goods is for the sole benefit of the owner. But in strictness the finder is not a bailee. He takes the goods without the permission of the owner; whereas in the case of a depositary the bailor selects this particular man as his bailee. But the rule is well settled that the finder is bound to keep the goods with the same care as a bailee, & this not because, at common law, he has any lien upon the goods for his care & trouble & even expense in keeping them. - - - - L. Ray. 917. 1 Pow. C. 252. -

It is said in a case reported in Bro. C. 219. that the finder is not bound for negligent keeping. The case was this. A man found 20 Tubs of butter, & by negligence suffered it to spoil, the Ct. held that the finder was not liable. The decision of the Ct. was correct, tho the reasoning of the Judge was not law, which was that the finder was not liable for gross neglect. Esp. di 399. Bro C. 219. 1 Bac. 243. The doctrine, I say in this case was not law, but the decision is. For an action of Trover (to convert) was brot, & the answer was, that the butter became corrupt by the negligence of the finder. The action was plainly misconceived & therefore the decision was correct. Salk. 655. 3 Burr 2827. Yelv. 251. 86. 146. Esp di 590.

I observed that the finder of goods has no lien upon them at Com. law for his trouble & expense in finding & keeping the goods. And he is liable to Trover if he refuses to deliver them to the real owner, if he is not reimbursed. 2 H. Bl 254. 2 Bl R. 1117. Stra. 681. The reason of this rule is, that there is no privity between the owner & the finder. A lien is the fruit of a contract. The question then arises, can the finder recover of the owner for his expense & trouble? This question has never been judicially determined in England. L.C.J. Eyre says, a Court would go as far as [illegible]

to reimburse the finder. But says N. G. I donot see how they can go at all, for it is a mere voluntary courtesy; & Esp. himself says that an action cant be supported unless the Ct. are willing to presume, there was an implied contract between the parties to find on one side, & pay the trouble & expense of finding & keeping the goods on the other side. 2 H. Bl. 254. N. G. thinks there can be no recovery. 7 T. 106. Esp. Dig. 87. 6 T. 95 2 H Bl 258.

In Conn under our Stat. there prevails a different rule. Here it is made the duty of the finder of goods of the value of 2/6. to advertise the same, & the finder has a lien upon the goods for his trouble & expense in saving the goods, & therefore it is advantageous to both parties & according to the general rule, he is liable for ordinary neglect. Stat. Con. 635. 6.

But a refusal by finder to deliver the goods to the true owner, is not a conversion per se, but only prima facie evidence of a conversion & will be conclusive unless rebutted. It is necessary for the true owner to give satisfactory evidence that he is the true owner, & the finder ought not to be subjected in an action of Trover, unless this sufficient evidence is adduced. And the Jury are to determine what is sufficient evidence. 2 Wilst. 312. Esp. Dig. 590.

There has occurred a singular case in Conn. A. found property which belonged to B. — C. a stranger demanded the goods, but A. refused to deliver them. C. brot an action vs. A. & induced the Ct. by false testimony, to believe the goods were his, & the Ct. gave judgment in C's favor agt. A. — afterwards B. the real owner brot his action of trover agt. A & he plead the former recovery of C. but the Ct. held this plea insufficient & gave judgment in B's favor agt. A. & he was obliged to pay for the goods twice.

Mr Gould thinks this principle both incorrect & unjust. For A has never done no more than by law he was compelled to do. Had he voluntered in delivering the goods to B. he ought, no doubt, in justice, to be liable to the true owner. If this is a true principle, A. the finder may by law be compelled to pay for the goods to B. C. D. & to every letter in the Alphabet.

Again, it is settled that if A forges a will for a dead person, & under this will proceeds to settle the Estate, collect the debts &c the rightful Executor cant compel those who have once paid to pay their debts over again. But the only result the rightful Ex. has, is to the false Exec. to whom the debts were paid. And the rule is the same, if one takes out Letters of Administration & afterwards a will appears. The above cases are analagous to the one I have before cited. i.e. the case of the finder being twice subjected.

The rule seems to be this, that where the law has compelled one to pay to a wrong person, it will never oblige him to pay it over again, even to the right person. 3. T. Rep. 125. 1 H. Bl. 669. 682. Doug. 161. 2 H. Bl. 408. 1 Esp. 242. -

Exclusive Ch.

If the pawnor, after tendering the money, brings his action of trover on the refusal to redeliver, still pawnee may recover his debt, but he must first make a demand of the money due, for pawnee is not obliged to carry him the money but once. 1 Bulst. 29. 31. 1 Roll. 238.

If the goods pawned are perishable & decay. Still the pawnee may recover his debt, for the pawn is not a payment but only a security for the payment of the debt or duty still continues. Yelv. 179. 1 Inst. 209. Salk. 523. -

The rule is the same under the maritime law in case of a Ransom bill. These bills are never given but by subjects of belligerent states. A Hostage is usually left to secure the payment of the bill;

the mortgage dies, or is retaken; & tho the ransom bill is lost it may be recovered. 3. Burr. 1734. 1 Bl. R. 563. Doug. 619. - And whilst the pledge remains unredeemed in the hands of the pawnee, he may sue & recover his debt, unless there was an express agreement to the contrary. Yelv. 179. Stra. 919. 2 Ld Ray. 916. Esp. Dig. 86.

As in the case of a Mortgage, so also in that of a pawn. If the debt is not paid at the day appointed, the property of the pledge becomes absolute at law, in the pawnee. But pawnor, like Mortgr. has still an Equity of redemption. 3 Atk 395. 1 Bac. 238. Shep. 106. 2 Vern. 691. 98.

Analagous to the maxim, "once a mortgage always a mortgage," so also "once a pawn always a pawn. The meaning of this maxim is, that if the goods were really delivered to secure the payment of a debt, yet they shall be redeemable in Equity, altho there was an express agreement to the contrary. So where one delivered an absolute bill of sale of goods to another, & the pawnee gave a writing in which it appeared that the goods were delivered in security for a debt, & tho' the writing stated that if the debt was not pd. on such a day the goods might be sold, still this was decided to be a pledge. ~~3 Atk. 604. 1 Ves. Sen. 1. 4. 2 Ves. & Bea. 362.~~ 2 Vern. 698. 1 Bac. 258.

A factor, tho he has a right to buy & sell for his principal, yet he can't pawn principals goods, so as to give the pawnee a lien upon the principal. Altho the factor has a lien upon the goods of his principal, yet he can't transfer it, for it is a personal right. Suppose then that B. the factor of A. pawns A's goods to C. now if A. tenders B. the amount of the lien which he (B.) had upon the goods, he may then bring his action of trover ag. C. 5. T. R. 604. 640. 1 Ves. Sen. 362. Stra. 1178.

After the day appointed for payment has elapsed, the debt not being paid, the pawnee may sell the pawn, for the title at law is absolute. A pawnor can't redeem from under stress in Mortgages. 1 Just. 205.

16.

Bailment.

It has been once holden, that pawnee may sell the pledge before the day of payment arrives. But this doctrine is manifestly incorrect. For till after the day of payment, the property is not absolute in the pawnee, & he has only a lien upon it. I think, says M. G. that the true rule is; that the pawnee cant assign or sell. For the rule that he may assign see 1 Bac 239. Owen 124. 1 Bulst 29. 31. For the rule that he cant, see Cro E. 246. 4 Leon 178. 3 T. Rep. 606.

Again, I have before said, that pawnee's lien upon the pawn is a personal right & cant be transferred, & it has long been settled that a pawn cannot be forfeited by the offence of the pawnee, i.e. his interest cant be forfeited, Yet a man, by crime, can forfeit whatever property he can convey in his own right. 12 Co 12. 2 Bac 376. 7. Brooke lays down the rule peremptorily, that pawnee cant forfeit the pawn. (assign for this 1 Bac 238. 4 Bro. 359. 1 Inst 8. as Popley supra.)

There is a case in Vernon which would seem to oppose this doctrine of assignment; but in fact it does not. In that case the pawnee assigned before the day of payment; & after the pay day, pawnor brot a bill in Equity to redeem w. assignee. The Ct. said he should not redeem unless he paid the original sum, which he borrowed of pawnee & also what the assignee had paid. The Court however went upon the ground that pawnor did not bring his bill till after the pay day had expired, & it was the same as if pawnee had assigned after the day of payment had elapsed. 2 Vern. 691. 8.

Again, it is a settled rule of law, that the pawn can't be taken in Execution for pawnees debt; because he has only a lien, & not the property in the pawn. 1 Bac 238. 353. 4 Com 288. Dyer 67 b.

Contra, altho the pawnee cant forfeit the pledge, yet the pawnor may by felony forfeit his right to it. The King can't, to be sure, devest pawnee of his lien. 1 Bulst. 29. 4 Com. Dig. 259. 4 Leon 179.

There

Bailment.

There may an enquiry arise into the reason of this rule, i.e. that pawnee cant assign before day of payment. To answer, says Mr. G. that this bailment is in the nature of a fiduciary contract. The owner of the goods may be very willing that this particular person should hold his property in pawn; but he may have many weighty & well founded reasons, against the assignee who the pawnee may put it to select; for the assignee may become a beggar & the pawnor thereby lose his goods. The case of a Mortgage is very different. There is no doubt but the interest in a mort. may be assigned. & the reason is, there is no danger, whatever may be the situation of the assignee, but the land will ever remain. Res tua ubicunque firma can never be run away with.

It was anciently deemed essential, that the pawn should be delivered at the time the debt is contracted, but this is overruled & any time subsequent is equally well. 2 Leon. 30. 4 Cr. 164. 1 Ves. 350. 59.

There was once a question, whether pawnee can be compelled to restore to pawnor the surplus of the pledge after it has been sold. No authority to this point — but I think, says Mr. G. that a claim of this kind could not be supported, i.e. that pawnee is not obliged to restore the surplus. —

If A delivers goods to B. as a security for a debt due from A to C. C becomes pawnee & A has no right to countermand the delivery. but, says Mr. G. it would seem to me that C. would not be considered as pawnee unless there was some agreement between C. & A. 2. Leon. 30. 4 Cr. 164. Dyer 49. Contra, Bul. N. P. 35.

If A delivers goods to B. as a naked donation to C. he may countermand the delivery at any time, for there is no consideration. A parol gift, without delivery transfers no right to donee. Ep. Ci. 87. 2. Leon. 30. ...

It was formerly doubted that if there was no day fixed by the parties, whether the pawnors right of redemption continues after their joint lives. But it is now settled that the pawnor has a right to redeem at any time during his own life, & that on his death the right of redemption ceases at law. Cro. J. 244. 5. Yelv. 178. 1 Bulst. 29. 4 Com. Di. 258. - 7 Co 79.

There being no day appointed, the pawn must be redeemed by payment or tender of payt. Yet pawnors Exec^r cant redeem. Bacon thinks however that pawnors Exec^r may have a right of redemption. 1 Bac 239. 1 Bulst. 29.

When a day is appointed, the death of pawnor does not destroy the right of redemption, if it was before the day; for pawnors Exec^r has the right. 1 Bac 239. 1 Bulst. 29. - And if the Executor does not pay at the day he has the same Eq^t of redemp. that the pawnor would have if he were living.

In case of the death of the pawnee. If he, i.e. pawnee, delivered his pledge to a stranger without consideration, still pawnor must make payt. or tender of payt to pawnees Executor. If the stranger refuses to deliver the goods to pawnor he is liable in trover. Cro. J. 244. Yelv. 178.

But suppose, in the last case, pawnee delivered the goods to the stranger for a valuable consideration. Now the church pawnor must make a tender to the Exec. or to the stranger depends upon the question, whether the pawnee has a right to assign, before the day of payt. Which question we have considered before. Yelv. 178. Contra, Bulst. 129.

V. The fifth species of bailment is a delivery of goods to be carried or some other act to be done about or with them by the bailee for a reward paid by the bailor. This kind of bailment includes a delivery to a

pawn-

private person & to a common carrier or one who executes a public character or employment.

And 1st. of a delivery to a private person. A bailment of this kind is one made to a person not executing a public employment. As a delivery of cloth to a tailor to be made into a garment.

A Bailment of this species is advantageous to both parties; it is advantageous to bailor because he procures some act done with or about his goods; & to the bailee, because he acquires a profit by doing this act. Agents, Attorneys, agisting Farmers, factors, waggoners & many others, are included in the class of private persons. As the bailment is equally advantageous to both parties, bailee is bound only to ordinary care, & liable only for ordinary neglect. L. Ray. 918. 1 Roll. R. 54. 12 Mod 487. 1 Vent. 121. Jones 14. 22. 32. 128. 9. 131. 33. 38. 1 Roll 4.

If goods are delivered to a private person, to be carried &c & loss is occasioned by robbery he is prima facie excused. But yet it must be a robbery accompanied with irresistable force. L. Ra. 918. 2 Mod 131. 4 Co 84.

If loss is occasioned by care theft, bailee is liable unless he shews ordinary care. Prima facie he is liable, because it is presumed ordinary care would save the bailment from theft; but this presumption may be rebutted. 2 Lev. 5. 1 Vent. 121. L. Ray 918.

Jones says, if the thing distrained bailed, is distrained by bailees Landlord, & sold, the bailee is liable; for it is ordinary neglect, & you will remember by the English law, the Landlord has a right to distrain any goods found on the demised premises. Jones 141. 3. Bl. C. 8.

Under this class of bailments (as under that of commodatum) there must be a diversity taken between it, & a mutuum.

*If silver or gold is delivered to a smith to work into an utensil, this is not a bailment, but a mutuum. The property

* See note at the end of the 2nd sentence on the next page. T. P.

vers 4

vests absolutely in the Smith, & he is alone liable for all losses which may happen. The Smith has a right to use the (bailment) property for any other purpose, or for any other Customer. The reason is, that to accomplish the intention of parties the mutuum is to be so altered by fusion that the property can't be identified, & is not expected to be specifically restored. This rule I find laid down by no writer except Jones, tho there are some analagous cases in the books. Jones 89. 143 2 Bl. 404. Poplan 38.

This rule is certainly true, Mr. G. thinks, in all those cases except where the nature of the property is not altered by fusion &c when the loss happened, & the reason why the property is supposed to be absolutely in the Smith is because it is not to be specifically restored. (Note p. J. R. Mr. G. has doubts so much while lecturing upon this principle, i.e. respecting the Smith, that I find it impossible either to gather his own opinion or find out correctly what the doctrine is. See note at the end of the title.) — 2 Bl. 404. Moor 20. Poph. 38.

When the bailment is to a person to do some act of skill in his profession, to the goods, for hire, the law implies a two fold obligation on the bailees part. 1st it is an obligation to restore the property after the labor is performed, & 2ds. that the labor so bestowed shall be skilfully performed. So a tailor engages not only to restore the garment, but also restore it skilfully made & if he fails in either of these obligations he is liable.

But if the act to be done is not in the professional business of the bailee, the law implies no contract that the work shall be skilfully done; but it does that he shall use ordinary care. So if a horse is delivered to a tailor to be shod, or cloth is delivered to a blacksmith to be made into a garment. But if there is an express cont. to do the work with skill, he is then liable. 3. Bl. 6. 166 Esp. di. 601 Jones 139. 140. see also 11 Co. 54a. Sav. 324.

Jones lays down another rule, viz.. that ordinary care does not imply that private bailee shall insure the goods bailed against fire, & that if the goods are lost by fire the bailee is not liable. Now says Mr. G. I think this rule should depend on usage & that he would be bound to insure in those places where it is usually done, & charge the premium to the bailor. And in those places where it is not customary to insure property of the description of his bailment he ought not to be bound. Jones 142.

If the goods which are delivered to this private bailee, be lost or destroyed, while the work to be done upon them remains unfinished, & this happens by want of ordinary care in the bailee, it seems that he is entitled to no wages for the labor he has done. The reason is, the bailor receives no benefit from his labor. I say it seems to be a rule. But I can see no reason why the rule i.e. the reason of it, should not apply with equal force, where the work is finished but is not delivered over to the bailor when the loss happens. Mr Goulds opinion is, that the bailee is entitled to his wages whether the work be finished or not. Esp. dig. 86. 3 Burr 1792 695.

October 6th 1812. Lecture 5th.

2ndly. Of goods bailed to a public character, or to a person executing a public employment. As E.g. a common carrier.

A common carrier is ~~is~~ any person in general who makes it his business to carry the goods of another person for hire; but merely going a journey for a merchant occasionally will not make a common carrier. A com. waggoner, a com. boatman, a com. porter, a com. lighterman if they receive hire for the goods they carry fall within the denomination of common carriers, & in fact every person whose regular employment is to carry for hire. 1 Day. 258. 7 Cob. 18. King 220. 1 St. Rep. 27. Jones 150. Co. L. 89. Esp. Dig. 61. 1 Bac. 343.

Bailment.

It seems formerly doubted, whether any other person than a carrier by land fell within the distinction, but by Statute of 26 H. 8. it was extended to common hoymen, & by Stat. Car. II. to Ship masters, which extends the distinction to carriers by water as well as by land. Jones 142. Hob. 17. 18. Cro J. 330. 1 Brownl. 190. 258. 2 Lev. 69. And since the rules of law have been extended to carriers by water, it follows that Ship owners, if their Ship is regularly employed in the transportation of goods, also fall within the denomination of com. carriers. And whenever the owner of goods has a right of action against such carriers by water he may maintain it, ~~he may maintain it~~, either against the master or owners of the vessel.

But by Stat. 7 Geo. II. the owners of the vessel are liable only to the amount of the value of the Ship & freight, if the loss was occasioned thro' the negligence or fraud of the master or mariners. So it seems that the owners are not liable for so much of such loss as exceeds the value of the Ship & cargo. But still if the action is brot vs. the master for his negligence, or for the loss, he may be made accountable to the owner of the goods, to their full value. 3 D. Rep. 18. 78. 1 Salk 440. 3 Lev. 259. Carth. 82. 1 Show. 2. 101

If a common carrier, having conveniences to carry goods such as are offered, & is tendered the hire & then refuses to carry, he is liable to the owner of the goods in an action on the case, because he makes an implied contract with the public, that he will carry goods for any person, who may apply to him, provided he has conveniences for that purpose. But if his waggon or boat is already full, or any accident befalls his team or carriage so that he can carry no more than a given weight, he is not liable in such cases, if he refuses to receive the goods. This rule is the same as to an Innholder if he has conveniences & refuses to entertain a traveller. But 1 P. 70. 3 Bl. C. 166. 1 Bac. 344. 3 Bac. 580. 1 2. 9 Ed 3.

Notwithstanding this rule a common carrier has a right to make a special i.e. a conditional acceptance; that is, he has a right to say he will not be answerable for the loss of valuable goods, unless he is made acquainted with their value & amount & is paid accordingly. 4 Burr 2298. Esp. dig 622. -

A bailment of this kind being mutually advantageous to both parties, the bailee would, if there was nothing to impede the application of the general rule, be liable for nothing less than ordinary neglect, & this was the rule in the reign of Hen. VIII. when it was holden that a common carrier was not liable for loss occasioned by robbery; but in a later period the reign of Elizabeth it was holden that the carrier was liable for all loss occasioned by robbery. 1 Inst 89. a. Moor 462. 1 Roll 2. - 4 Co 84 a. 1 Bac. 345. - Jones 144 -

Since this time i.e. the reign of Queen Elizabeth, it has been well established that common carriers are liable for all loss occasioned in any way, except by act of God & the kings (& the contrary enemies) public Enemies. - 2. Ray 918. 3 Burr 1593. 1 Stra 128. 1 Holt 131. 1 Wils 281. 1 Salk 18. 1 T. Rep. 27. 1 East. 509. -

Lord Coke, assigns as the reason of this rule, that he is made liable because he receives a reward for carrying. But says Mr. S. it will at once be seen that were this the reason of the rule it would apply with equal propriety to a private carrier, i.e. to one, who bestows labor upon the bailment. The true foundation of the rule is in public policy. A com. carrier is one who makes this his business; he is necessarily trusted by the public at large; all are obliged occasionally to commit the safe keeping & safe transportation of their property to such persons; he then, on would have equal opportunity to defraud his customers, & it is upon this reason that his liability is extended. 1 T. Rep. 918. Jones 140. 1 Salk 143. -

Bailment.

Tho the receiving of a reward is not the true reason of common carriers liability, still it is true if he receives no reward he is not liable to this extent. The receiving a reward is necessary to his character as a common carrier, & no one acts as such unless he does receive a reward. If he does not receive a reward he is a mandatary, a bailee of the 6th class kind, & in such case if the goods are lost &c he is liable only as a mand.ry Lord. 485. Esp di. 621. East 604.

As every bailee stands in the nature of an insurer agt. all risks for which they are liable, so a com. car. is an insurer agt. all losses, which may happen except thro invitable accident i.e. the act of God & public Enemies. "Acts of God" and "invitable accident" are used in the law as synonymous terms, & according to Ld. Mansfield they mean such accidents as could not happen by the intervention of man; as lightning, tempests, earthquakes &c. 1 T. R. 33. Stra. 128. - Hence fire occasioned otherwise than by lightning is not considered as the act of God. And where goods were lost in a Ship by means of a rat knawing a hole in the side of the vessel, the carrier was held liable. 1 T. R. 34. 2 Ld. Ray. 1131. Egyn 16. 60. 1 Wils 281. B. & P. 70. Jones 142.

It is determined that com. carriers are liable for losses occasioned by mobs insurgents & robbers, for they are not considered public enemies within the rule. It is not necessary however to constitute an enemy, that they are declared so by the acts of a Sovereign State; for Pirates upon the high seas are deemed public enemies. But fresh water pirates as they are called, i.e. such as infest the rivers & harbors, are not within the rule. They are robbers merely. 1 Vent 190. 239. 1 Mod 85. Esp di. 620. 1 Ld. R. 18. -

I have observed that the acts of God & public enemies only will discharge the com. carrier of his liability. But it is not

necessary that the immediate loss is occasioned by the act of God, it is sufficient if it is the procuring cause. Thus, if it is necessary, in a tempest, to throw the goods overboard, the carrier is as much excused as if the goods & ship had all been lost, because the tempest, which is the act of God, is the procuring cause. Jones 151. 2 Bulst. 280. 2 Roll. 567. 12 Co. 63. 1 Bac 345.

There is a case in Allyns R. 93. where an action is brot. agt. a com. car. for the loss of a box of Jewells; he pleaded that in a violent tempest he was obliged to throw the box overboard. The Ct. held the master liable. The Ct. says Mr. E. must have proceeded on the ground that it was necessary for the safety of the Ship, its weight being of trifling consequence. I would here observe says Mr. E. that whenever it becomes necessary for the safety of the Ship, that the goods be thrown overboard, the owners, the freighters, the master & the passengers are to average the loss among them according to their respective interests in the Ship. This is a rule introduced by the maratime law & is different from the com. law principle. Beaus Lex Mer. 148. 2. T R. 407. 1 East 220. 1 Rost 60. Stat. Con. 291.

In this as in analagous cases, I observe that if a com. car. voluntarily exposes the goods to danger, from the act of God, he shall not be excused, for his own rashness is the causa causans. As if a common hayman rashly puts to sea in tempestuous weather, he shall be liable for the loss. Stra 128. Esp. di. 620.

The com. car. is also excused if the loss happens thro the act or default of the bailor. Thus if a pipe of wine should be delivered to a com. car. in a state of fermentation, or in any situation unfit for transportation & it should burst the cask & be lost, the carrier is not liable. For it is the owners fault or folly that the loss happens. Bul. N P 74. Esp. di. 621.

So

So also if the carriers waggon is full, & the owner forces his goods upon him he is not liable; i.e. to the extent. He is not liable as a common carrier, but he is, if the loss happens thro want of ordinary care 2 Shower 327. 1 Bac 344. - Suppose, E.g. that the owner of goods, liable to damage from rain, insists that they shall be carried upon the deck of the Ship, the carrier is not liable for any loss or damage which may befal them (by rain); for it happened thro the fault of the owner — but if he put his goods on board, & the master had not secured them under hatches, & they had been damaged by rain, here the master is liable, altho the loss is occasioned by the act of God.—

In order to subject the carrier within these rules, the goods must have been lost while in his possession & under his immediate care & control. Hence it has been determined that if the owner of the goods should, (or) his servant in the vessel or boy to take care of them, the master is not liable. That is, he is not liable to the extent a com. carr. is, but he would be for ordinary neglect. The reason he is not liable as a com. car. is because the goods are not considered in his immediate possession. - So if the goods are stolen or they are damaged by the passengers he is not liable for the same reason. But if the goods are delivered to the carrier, & he should request a passenger or other person "to mind an eye upon them" this would not excuse the carrier. So that the rule seems to be this viz. if the carrier has not a control over the goods he is not liable as com. car. So if a passenger carries baggage in the Stage, as he has the control of it, I think says C. the driver would not be liable in case of loss. Esp dig 621. Bul. 70. 2 Shower 327. Skin 695. 1 Bac 344. Cro. J. 330. 1 Roll. R. 6. 17.

It is also determined that a common carrier, tho ignorant,

the contents of the box or chest is liable for the contents, unless the loss is occasioned by the act of God. provided he does not discharge himself by a special acceptance. Bul. N.P. 70. Stra. 145. Carth. 485. 2 East. 125. I suppose, says Mr. J. if the carrier knows the box &c contains goods but does not know what the specific articles are, & there has been no fraud practised upon him. this rule is correct. But there are two cases in the books, where the carrier was holden liable, altho' the owners of the box &c misinformed him of the contents. Ally. 93. Bul. N.P. 70. - Thus in one of the cases, where the owner told the carrier his box contained nothing but some sheaf silks, when in fact it contained a large sum of money, & he was robbed. 1 Vent. 238. In the other case he was told the package contained nothing but a book & some tobacco, when $10.000 in specie & bills were the contents; in both these cases the Ct. held the carrier liable, to the amount of the actual contents. Ally. 93. 3 Bul. 135. Doc. & Stu. 130.

These two decisions were sensibly shaken by Lord King, & more so by Ld. Mansfield. It is evidently a most unjust principle. For had he known the actual contents, most likely the robbery would not have happened. He would have so augmented his guard as to be able to resist any force. I think these cases may be considered as overruled, as they were shaken by Lords King & Mansfield. 4 Burr 2390. Stra. 145. 1 East 610.

By a "Special acceptance" is meant an express agreement made between the bailor & bailee stipulating how far bailee shall be liable. And -

For the purpose of making this special acceptance it is not necessary there should be a personal communication between the bailor & bailee. It has been determined that an advertisement in a public newspaper, stating on what condition of

& what only he will be responsable for loss may be consid
ered as a Special acceptance. Such an advertisment, tho it
is not per se a Special acceptance, may be given as evidence
to the Jury that the owner of the goods had knowledge of
the condition of the acceptance. Bul. N.P. 71. 4 Burr 2298.
Carth. 485. Esp Di. 622. This however is not a universal rule, for it
may be proved that the bailor never saw the advertisment,
nor knew its contents then he could not assent to its conditions.

Under a genral acceptance a com. carr. is liable for what
he receives supposing there was no fraud or concealment by the
owner of the goods, but if he accepts specially he is liable for so
much only as he engages to carry. The reason is his resp. extends
to no more than he engages to carry, & therefore he ought to be
liable for no more than his compensation extends to. Suppose E.G.
that a carrier has 1 pr cent for the carriage of money, & the
owner tells him his box contains but 100£ when there is in fact
1000£. here as his compensation extends to but the 100£ he shall
be liable only for the 100£ in case of loss by robbery. To the resi
due in the box he is not a com. carrier & nothing less than gross
neglect or a violation of good faith will subject him for the
Exs. 1 Bul N.P. 70. 1. Carth. 485. Esp. di. 621.

In 1. Wm. 13l. is a case, where an action was brot ag. common
carriers for a loss of goods. The carriers had published the terms
on which they received cash or other valuable articles which would not be
accounted for, unless the amt. was known by them & an assurance
paid for the goods according to their value - the owner deceived them
by hiding the parcel & paying only the customary carriage of valu-
able articles altho he knew the terms. The Ct. held the carriers were not
liable to any amount, not even what was pd. for transportation. 1 Wm. 13l.
298.

Hence the master of a Stage Coach, who recieves hire for passengers only, & not for baggage is not liable as a com. carrier for the loss of the latter; but if it is his business to recive him for the carriage of baggage also, he is subject to the rules before laid down. Com. R. 25. Salk 282. 2 Show. 128. 1 Bac. 343. 4. Esp. Di 622. 624.

But tho he is liable only for that, to which his reward extends, yet it is not necessary in order to subject the com. car. that he was actually paid his reward at the time he recived the goods, or that there was an express contract that he should have after be paid. In such case the law implies a contract & the bailor would be liable to him on a quantum meruit. 1 Bac. 343.

Neither is it necessary for the purpose of subjecting the carrier, that the goods should be lost in transitu. If they are lost before the delivery according to the terms of the bailment, it seems he is in general liable. Thus if he stops at an Inn, it is no excuse for him, that he put the goods under the care of the Innkeeper. It is his duty to deliver the goods to the consignee, unless there is an established custom to deposit them. 2 Bl. R. 917. Esp. Di. 623. 3 Wils & 29. 4 T. R. 581

If it is the established custom, after the goods arrive at the place of distination, for the carrier to deposit them in a ware-house of his own, he is liable as com. car. for no loss, which happens at the warehouse; but in this case he is liable to the same extent any other ware-house-keeper would be, i.e. he is bound to ordinary care & liable for ordinary neglect. 4 T. R. 581.

It is a general rule that if the consignee directs by what carriage the goods are to be transported, the action is to be brot by him & not the consignor. If contra the consignor selects his carrier he must bring the action agt. the bailee. If the consignee makes

himself liable for the risk, when the consignor selects the carrier, & he may bring the action & so vice versa, because in such case the consignee & consignor are both privy to the contract. 3 T R. 330. Bulst. 130. 1 Roll. R. 343. 353. 12 Rep. 65. 5 Burr. 2680.

When an action is to be brot. ag. the owners of a Ship, or the owners of a Stage Coach, they must all be joined, because the contract owners, & they are liable quasi ex contractu & not ex delicto as in Tort. The master may be guilty of a tort, yet the owners being absent are not. Salk 440. Esp. ni. 623. But if all the owners are not joined, the non-joinder is pleadable only in abatement. This has been the established rule ever since the time of Lord Mansfield. In Lord Holts time it was otherwise. It was then holden that advantage of such non-joinder could be taken under the general issue. 5 Burr. 2611. 5 T. R. Rep 651. 1 Salk 440.

At common law, a Post Master as he was not an officer appointed by law, was liable for losses as a common carrier. But the Statute 12 Car. II suppressed all private posts & post offices, & established a general one; since which time Post Masters are not liable as common carriers. He is now an officer appointed by the Government; he makes no contract with those, whose send letters, neither do they pay him any reward or hire; there is no privity of contract; all his hire, i.e. his commission is allowed him by the government. Besides the Post Masters non-liability seems to be founded on public policy. For were they liable, no man on Earth would venture to take upon him the office of Post Master General. Salk 1 L. Ray 646. Comyns 464.

Upon these principles the Post. M. Gen is not liable for the defaults of his sub officers, for by law he is bound to appoint them, in doing which he acts officially. But a post Master is liable for his own defaults as any person would be, who is intrusted with business. Salk 18. 3 Wils 443. Comyns 765.

Bailment.

Common carriers liability is said to be founded upon the custom of the realm, & this custom was to be construed upon accounting to the custom of the old practitioners. But it is unquestionable unnecessary as this custom is no more than a branch of the Common law. 1 Sid 245. 1 Bac 343. 2 Lev 172. 1 Ld Ken 18. 1 T. R. 33. Jones 103. 3 Mod 287. 227.

The remedy agt. com. car. when the loss is occasioned not by any misfeasance of the carrier is a Special action on the case. Trover will not lie unless there is a conversion & there can be no conversion unless there is a misfeasance. This Special action on the case, may sound in delicto or ex contractu whether he was guilty of a misfeasance or not. Trover will not lie for a non feasance yet it will lie for a misfeasance, as destroying the goods, breaking open the trunks &c. 2 Salk 655. 2 Ld R 251. 8 Co. 146. 5 Burr 2827.

Under this class of bailees of the 5th kind I have formerly treated of the duties of Innkeepers; but there being some rules, which apply to this class of bailees alone, & not to those first to be considered I have chosen to consider them under a distinct head & title.

I would here observe generally as to all bailees of the 5th kind, that if the loss or damage is not occasioned by the misfeasance of the bailees, the owner may declare on Special assumpsit, or Specially on the case sounding in neglect. 3 East 62. 12 Wils 282. 2 Wils 359.

VI. Bailment of this kind is called mandatum, & is a delivery of goods to be carried, or some other act to be done about or with them, by the bailee without any hire or reward from the bailor. The difference between this & the 5th kind of bailment is, here the act is gratuitous. But there is a very close affinity between this & the 3d kind of bailment, i.e. a depositary. The difference is, the duty of the depositary is, his custody; that of a mandatary lies in feasance, that is, doing some act. This kind of bailment is advantageous to bail-

or

bailee only, & therefore the bailee is liable only for gross neglect or a violation of good faith. This is the kind of bailment in the case of Coggs & Bernard. L. Ray 909. 919. 1 Ld. Bl. 158. 2 Sw. L. 255

I here remind you that this rule, as to the extent of bailee's liability, holds only in those cases, where there is no express agreement between the parties, for bailees further liability. In some cases there is an implication, in the nature of the bailment, that the bailee is to use all necessary skill &c. But this engagement is implied only in those cases, where the act to be done is in the regular line of the mandatary's professional business. 3 Bl. C. 165. 6. 1 Ld. Bl. 158

A question has arisen, whether an express promise by a mandatary is binding upon him, as a contract or for gross neglect. For C.J. Longfellow in the case above cited from 1 Ld. Bl. in delivering the opinion of the Court, observes, that where there is an express engagement by the bailee to use a given degree of care or skill, the omission of that care or skill is gross neglect. This dictum of Longfellow's Mr. G. thinks is incorrect; for gross neg. is generally the same in every kind of bailment. It is ever no more nor no less than the omission of that care which every man of common sense, however inattentive, takes of his own goods. If the bailee should stipulate ag. all losses by inevitable accident, & the goods should be destroyed by tempest or earthquakes, it would be said, were this dictum true, that it was gross neglect in the mandatary, & this for no other reason than because he has made himself liable for such accidents. The mandatary therefore, says G. is liable on the contract not on the grounds of gross neglect. The difficulty which occurs here, i.e. making mand. liable on his contract, is want of consideration. But Lord Holt says that the delivery of the goods is a sufficient consideration at Com. Law - for the delivery to the

mandatary is an act that will be disadvantageous to the bailor, if in the event the object of the bailment is not performed according to the terms of it, & to his expectations. This is abundant consideration not only in this but in every species of bailment. 1 Bl. 158. 162. 2 Ray 909. 4 Mod. 128. Contra Bro. J. 667.

Jones makes a distinction which is too refined to be practicable. He says that the duty of mandatary is greater in the case of a Feasance or where there is some act to be done, than in the case of custody, because the nature of the thing implies it, & because more care is requisite for the safe carrying of the goods from one place to another, than simply in keeping them. He says that the liability of a mand. is greater than that of a depositary. He cites no authority but you may see his doctrine in Jones 73. 4. This rule of Jones is also contrary to the doctrine laid down in 1 Bl. as before cited. Therefore I reject the rule, for 3 reasons, 1st, it is too refined, 2d it is arbitrary i.e. unsupported by authority, and 3d it is not consonant with other rules of bailment.

When the act to be done is in the line of the bailees business, he is liable for the want of all necessary care; but this means all necessary care in the feasance, or the act which the bailee has stipulated to perform - & does not extend to any external duties, the omission of which would be less than gross neglect; as carefully watching the goods, ag. the wrong acts of others. A tailor, who receives my cloth to make into a garment as a mandatary, is bound to make it skilfully, because it is in his line of business, but his liability does not extend to acts of the ruffian, who burns or steals the cloth, unless it was occasioned by his gross neglect. 2 Ray 920 or 910. Bul. N. P 73. Jones 76. Pow C. 255. Cro J. 667. I have now enumerated the particular kinds of bailments, and the rules which apply to the different classes; there are however some General rules remaining, that I will now give you.

General rules as to Bailments. — And 1st as to the bailees right of lien upon the goods bailed. A lien, properly so called exists only in favor of the 4th. & 5th classes of Bailees. By the term "lien" used in the law is meant a direct claim to, or incumbrance upon some specific property for the payment of a debt or duty, in his favor. This right does not exist in favor of all the bailees of the 5th. kind, but it does extend to all of the 4th, because the very object of giving a pledge, is to give the bailee a lien upon it as security for the money due. 1 Salk. 178. Salk. 522. 6 Mod. 245. 2 Vin. Abr. 419. Cro. Eliz. 583.

Most bailees of the 5th kind have this lien upon the property, but the right is not founded upon any express contract to that effect, as in the 4th kind, but upon an implied condition annexed by law to the bailment. The rule is not universal. 1 Holt 442. 3 Bac. 185.

Whenever this right of lien exists in favor of the bailee, & a third person wrongfully obtains possession of the goods, such 3rd. person can't avail himself of this right; & the owner may maintain trover ag. such wrong doer, without tendering to the bailee his due. As if A. pledges goods to B. to secure a debt, which is to be payed in six month, & within three months C. wrongfully obtains possession of the goods, A. may maintain his action ag. C. immediately & without tendering to B. the amt. of his lien. For this right of lien is strictly a personal right. But if the bailee voluntarily delivers the goods to such 3d. person, the owner can't recover the goods till he has tendered the bailee his due. 3 East 585. 2 T. R. 485.

And a common carrier has this lien; & he has a right to detain the goods until he is paid. 1 Ld. Ray. 752. Salk. 654. 5 Bac. 269. 2 Str. 1264. contra 1 Ld. Ray. 857. And if goods are stolen & delivered by the thief to a common carrier, he may detain them ag. the true owner himself till he is paid for the transportation, & the reason is, that

the law obliges him to receive & carry the goods. L. Ray. 861.

So also a Tailor has a lien upon the cloth delivered him to be made into a garment. 8 Co 147a. 2 Bol. 442. The Tailor is not bound to receive the cloth as the common carrier is the goods, but the conviction in this case is annexed by law in favor of trade. Pappenheim says M.S. that when the Tailor has been in the habit of trusting to my personal credit for his pay, he has not this lien unless he informs me that he shall depart from his customary rule, & I must pay him down when the work is finished. 1 Bac. 240. note.

But an agisting farmer has not a lien upon the cattle like he is paid for their keeping. For in this case, neither of the above reasons will apply; he is not obliged to receive them, neither is it for the furtherance of trade & commerce that he should. Esp. di. 583. But N. P. 45. Bro C. 192 n.

The Master of a Ship has no lien upon the Ship herself for his services or for repairs or stores he furnishes. Hence he can't libel the Ship in the Court of Admiralty for his wages &c. The reason is his contract is with the owners & he depends upon their personal responsibility for his pay. But the under officers & mariners have this lien & may libel here. As case of Wilkins v. Carmichael in 1 Doug. 97. Salk. 33. 2. Ray. 8; 6. 632. 12 Mod. 440. 1 Dallas 49. Abbot on Shipping 140. That the Officers & mariners have a lien see Abbot 4. 89. 60. 1 Doug 101. Stra. 937.

But this right of lien, in every case, is forever lost, by a delivery of the actual possession of the goods to the owner. Esp di 384. Stra 554. Now this is not an arbitrary notion of the law; for a lien arises in the actual possession of the property. It would be absurd for me to say I have the property not in my

possession, for a lien in the very nature of the thing, is a right of continuing possession. 1 Burr. 493. 4. T. R. 4.

Contra, where there is a special agreement, on which the bailee relies for his reward he cant have a lien upon the goods; for it has been holden that a special agreement between bailor & bailee, to pay a certain sum of money is an abandonment of this right of lien, for when the parties themselves make a special agreement the law will imply none. Esp. di 586. 5. 8 Bac. 271. 2 Roll 92. - H. 66.

A factor also has a lien, implied by law upon the goods of his principal, not only for a special but for a general balance. 1 Burr 494. 2 Bl. R. 1154. 3 T. R. 119. Amb. 254. But he cant transfer this lien to another, nor create a new one in another's favor when the goods of his principal. 5 T. R. 604. 1 H. Bl. 362. Bro. 1117. I observe that bailees of the 2nd & 3rd kind undoubtedly have a right to detain the thing borrowed & hired, for the time stipulated, against the bailor himself. e.g. If I borrow or hire a horse for a particular journey, or for a specified time, the bailor can't unhorse me till the journey is performed or the time is past. But this by no means can be called a lien; for it is not an incumbrance upon the property for the payment of a debt &c. but it is merely a right to use the property according to the terms of the bailment. Yelv. 172. 1 Bac. 240. The bailee of the 1st kind has no lien, for he has no compensation. The borrower is generally bound to deliver up the article on demand. So a mandatary has no lien, for he is a mere volunteer Yelv. 172. 1 Bac. 240. - -

So much for bailee's right of lien. -

October 7th. 1812. -

"Bailment."

I am now to consider how the rights of third persons are affected by a contract of bailment. October 8th. Lecture 7th.

If one bails the property of another, it is said by some that the bailee must redeliver the property to the bailor according to the terms of the bailment & not to the true owner. Roll. 606. 7. 1 Bac 237, 242. But, says Mr. G. I think there is no thing more meant by this rule than that the bailee will be justified in delivering the goods back to the bailor, because he is unable to act judicially between the parties & determine whose the property is. Roll says, if the bailee redelivers the bailment to the bailor before or pending the suit of the owner against him, this redelivery will bar the owners action. 1 Roll 607.

I observe here, that if the true owner does not exhibit sufficient evidence of ownership the bailee is not bound to deliver the goods to him. But if he does exhibit such sufficient evidence of ownership the bailee is liable to the owner, unless he discharges himself by a redelivery to the bailor.

But it is said that if bailee, in such case, dies & his Ex^r. comes into possession of the bailment, he the Ex^r. is bound at his risk to deliver the goods to the true owner & not to the bailor. The reason assigned is that he comes into possession of the goods by the act of law & he is not privy to the personal trust of his Testator. But says Mr. G. this reason to me is unsatisfactory and I believe our Cts. would hold a redelivery by the Exec. to the bailor according to the terms of the bailment would bar any act. the owner should bring agt. him. 1 Roll 607. 1 Bac. 237.

Rights of bailees Creditors & the rights of those who furnish the property of the bailee & suppose it to be his.

To determine questions under this head, we must resort to the

the Statute restricting fraudulent conveyances. The Stat. 13 Eliz. relates to Creditors. And it is a general rule that if the purchaser leaves the goods purchased in the vendors possession under a bill of sale, or absolute contract, a creditor of vendor may safely levy an Execution upon them as vendors property, & the purchaser can't hold them. The reason is that such sales, i.e. when the property is in the vendors possession, display false colours, & is grounds of practising fraud on other persons. 3 Co. 81. 2 Bac. 603. Comyns 432. Ath. 180 & 180. 2 T. R. 587. 7 D. 71.

But this rule is confined to an absolute sale. For if the want of immediate possession by the vendee is inconsistent with the deed of sale & it is not of course a fraudulent sale, if the property is suffered to remain in the vendors possession. So if there is a condition to be complied with vendee has no right of possession till it is performed, & Mr. G. says, I suppose, the rule is the same even tho it is condition subsequent. 2 T. R. 595. Comyns 432. 2 T. R. 462. Ath. 107. Nor is a sale of goods within the rule where from the nature of the property immediate possession can't be given. 2 T. R. 462. Esp. Ni. 342.

The Stat. 13. Eliz. relates to creditors, & is in affirmance of the common Law. Lord Coke says, it is in affirmance only as to prior creditors. But Lord Mansfield says it is to both prior & subsequent ones. Comyns 434. 3 Co. 83.

Want of immediate possession by vendee when there is an absolute sale, is by some authorities per se fraudulent. 2 T. R. 596. 7 D. 71. This rule is however very questionable. I find but one case where it was so held viz. Edwards & Har. in T. Rep. It is I think only a badge of fraud. I have seen an opinion of Lord Ellenborough & Lord Eldon in Cases R. wherein he questions the authority of Edwards & Har. Our Sup. Ct. have always decided that it was only a badge

of fraud, till a late case when three of the Judges gave it as their opinion, that it was per se a fraud. This case was carried to the Ct. of Errors & their decision was that

Another Eng. Stat. 21 Jas. I. provides, that if the bankrupt has the goods of another in his possession order & disposition with the consent of the owner, they shall be considered as the property of the bankrupt & may be taken to satisfy his debts. We have no such Stat. in Conn. 1 Aik 166. 1 Bos & Pul. 82. Esp dis 556. 7 T.R. 328. 1 Ves 348. 2 Atk 67.

This Stat. relates to no others than Bankrupt Bailees. For if the bailee is solvent the creditor may take his remedy against the bailees Estate. — I observe, the creditors of bankrupt bailees are bound to take the goods in his possession, not by reason of any fraud supposed to exist between the bailor & bailee, but by reason of the false credit given to the bailee by having the goods in his possession. This is founded on the common law principle, which is, if one by putting property in to the hands of another enables him to defraud an innocent 3. person the person thus assisting shall suffer rather than the 3. person. 1 Ves. 364 to 372.

This Stat. does not extend to goods found in the Bankrupts possession, which he holds in right of another. As if he is possessed of goods as Exec. or Adm. Here if the Executor becomes bankrupt, his creditors can't take these goods to satisfy their debts, for this would work a manifest injury to the testators representatives. The rule is the same, when the husband is in possession of property, which the wife holds to her own separate use. Altho this possession may give the hus. a false credit, yet they are not allowed to purge upon the wifes property. Were this the case, it would be a remedy one injury by creating a much greater one. The rule

holds good as to a Factor; for if he becomes a bankrupt his creditors can never take the goods of his principal to satisfy their debts. 1 Atk. 154. 3 P. Wms. 187. 3 T. R. 618. 1 Sel. N. P. 192. to 202.

But the Statute does extend to cases where goods are sold or mortgaged, & the possession is suffered to remain in the vendor. The vendor, in such case, is the bailee of the vendee, & if the goods are then found in his possession they are liable for his bankruptcy. 1 Atk. 165. 1 Ves. 348. 1 Wils. 260. Sel. N. P. 189. 90.

But if a man sells a Ship, which is then at Sea, & afterwards becomes bankrupt, the Ship will not go to satisfy his Creditors; for here it is impossible to transfer the possession to the vendee, & also, it cant give the bankrupt a false credit. But if on the Ships return the purchaser suffers her to remain in the possession of the vendor for no particular purpose, & the vendor afterwards becomes bankrupt, she would be registered for the benefit of his Creditors. 2 T. R. 462. 85. 91. 1 Atk. 160. Esp. di. 566. 1 Ves. 352. 612. 6.

And in many other cases, the want of actual delivery does not bring the case within the Stat; for sometimes the non-delivery can be satisfactorily explained. Suppose E.G. a merchant sells a Store of Goods at one Sale, to a person & it is reciprocally inconvenient that the possession of the goods should change hands at that time, or that day, or that week, take place by the vendee; here a symbolical delivery would be sufficient. as if the vendor delivers to the vendee the key to the Store. This is a virtual delivery of the goods. 7 T. R. 71.

The great discriminating rule is, that the bankrupt at the time of becoming such must be in the possession & have the order & disposal of the goods. The possession must be such as will make him appear to be the owner of them, & as they are not within the Stat.

As if A. should import an assortment of goods & puts them into the Store of B. & suffer him to deal them out from time to time; B may well be considered as the true owner unless A. exercises some public acts of ownership, & these goods will be subject to B's debts whenever he becomes bankrupt. The reason here is, the actual possession of the goods, give him a credit. The only difficulty, which occurs in this part of the subject, is to ascertain when the goods are in the possession order & disposal of the bankrupt, & the example above will be sufficient to illustrate my meaning. - Comyn. 233. 6 Ath 185. 1 Bl. R. 1. 19. 200.

A temporary possession for a particular & necessary purpose does not bring the case within the Stat. Eg. Suppose a merchant from Conn. should go to N. York & there purchase an assortment of goods, & the vessel or waggon destined for their conveyance does not start for a week from the time of purchase; & the Merchant should leave the goods in possession of the person of whom he bought it. & before the week elapsed the vendor became bankrupt, these goods would not be liable for his debts.

Again, in other words: the bankrupt must appear to be in all respects the owner of the goods to bring the case within the Stat. Hence if from the nature of the bailees business, all presumption of ownership is excluded, the creditors cannot have the goods. The situation of a factor will illustrate this. He is indeed in the possession & has the whole order & disposal of the property, yet by the very nature of a factors business it is well understood he is not the owner. So of a vendee. Master &c. 1 P. W. 318. 3 D. 185. 1 Bos & Pul. 82.

Thus far as to the Creditors of the bailee. For the purpose of giving construction to a Stat. expressed in quot verbis, it cannot be expected that I should multiply cases. Now for the purchasers &c.

Bailment.

In common cases of bailment, where the bailee has not the possession order & disposal of the goods, or if he has the possession &c he is not a bankrupt, the rule is, that the owner will hold the goods against any person who purchases or obtains possession of them be it ever so honestly, or any subpurchaser or any creditor of bailee; except in such case the bona fide sale & purchase was made in market overt. As if A. lets a horse to B. (a bankrupt) to perform a particular journey. Here B. is in possession of the horse but this is not sufficient evidence of ownership. Suppose a stranger purchases the horse of B. the owner may have trover v. him; or if the creditor of B. levys an execution upon him, the owner may have his action v. the officer or creditor; & if the officer sells him at the post & he afterwards is transferred thro half a dozen hands the same principle holds. The maxim in law is, Caveat emptor. 1 Wils 8. 2 Stra 1187. Salk 283. 3 Atk 44

The celebrated case of Hawkesworth v Hoare explains in general all the great principles, which regulate this branch of the law. 2 T. R. 376. 4 Do. 611. It was, in brief, this — A. borrowed of B. a sum of money & to ensure the payment he pawned a box of jewells to A. which box was sealed up. Before the time had expired B. broke open the box & sold the Jewells. The action was brot ag. the purchasor & he pleaded that he had paid B. for them who appeared to be the true owner. But the Ct. gave judgment for A. ag. the purchasor. The ground of their decision was that B's appearing as the owner was in consequence of his breach of trust &c. &c.

There is a single exception to this rule, viz, where the thing bailed is money, or the representative of money. This exception is founded in strictest policy; for it would be impolitic, laborious & perplexing if one was obliged to sue for the title of every dollar in circulation. Caveat emptor is no maxim here. Salk 126. 1 Burr 452. 3 Do. 1516. 1 Bl. R. 485. Esp. di 39. 579.

Bailment.

Our Stat. in Conn. as to fraudulent conveyances is the same as the English Statute. But we have no Stat. like Stat. 21 Jas. I. but the principles adopted here in relation to bailment to insolvent persons, are similar to those adopted in the construction of that Statute in England. 2 T.R. 70. Jac. Abbott's Opinion.

And our Cts. have determined that where there is no actual fraud the creditors of the insolvent bailee can't take the goods, however decisive the appearance of ownership may be. It is the same in the case of a purchaser. But if the bailee is insolvent, the Eng. principle in its full extent is adopted. 1 Bos. & Pul. 82. 8 Doug. 306. 7 T.R. 6. 7. 237. 4 Bos & Pul 648.

Hence, when the bailee is insolvent, a creditor or purchaser cant hold, unless there is clear evidence of ownership, & unless there was consent of possession given by bailor. E.G. Suppose one (20) hire his horse to an insolvent person to perform a journey &c. creditor can never take him; suppose the person should sell him, purchaser would not hold him;

A question has occurred in Conn. whether the lessor of a Cow can recover ag. the creditor of the lessee who had taken the Cow in Execution. The Cts. have decided that the case is not sufficient evidence of ownership, & that the lessor may recover. There is one leading case, but I believe so long ago that it is not reported. It was this. A man purchased a drove of cattle in the north part of this County, & employed another person to drive them to N York market the nearest way. Instead of doing so, the servant left the nearest road, & drove his cattle to Litchfield & sold them here. The owner of the cattle lost his action ag. the purchaser, & the Ct. determined, that a man driving cattle was not sufficient evidence of ownership, & the bailor must recover.

Bailment.

If goods are bailed for hire to be used by the bailee, the creditor of the bailee can't take the use of them in Execution. There is a dictum of Lord Kenyon's, in which he seems to infer a different doctrine in the case of Gordon v Harper. 7 T R. 11. 12. The question is this, Suppose I hire a horse to B. for six months, can his creditors attach the use of the horse & have it sold off in the execution. Mr. G. thinks he can not, for every bailment is a personal trust. I may be very willing that my friend B. should use my horse for six months, but have the most urgent objections against the creditors of B. taking the use of him, for before the time expires he may become a bankrupt & a beggar & I lose the horse. This danger never exists as to real Estate therefore the rule is different.

To what actions or remedies the bailor and bailee are respectively entitled as to Strangers & as to each other. { Weller 9th. 1812 / Security 8th.

It is a general rule that bailor, he having the general property, may maintain an action against a Stranger for taking away or injuring the goods, while in the possession of the bailee. By general property means all the interest, except the bailees special interest in the bailment. 1 Roll A. 2 Bulst 268. Salk 214. 2 Bac. 164.

And this rule holds, as the case may be, even tho' the bailor never had the actual possession of the goods. (as if the goods of A. were bailed to B. & A. makes a bill of sale of the bailment to C. & if X. X. should injure or take away the goods before C. had gotten possession of them, still he may have an action vs. X. X. In this personal property draws after it a constructive possession: & right of possession is this constructive possession. Salk 284. 214. Sid 438.

For the purpose of maintaining trespass or trover the bailee must have either an actual or constructive possession of the goods. Thus if A. bail goods to B. for him for six months and

during this time B. wrongfully obtains possession of the goods; here A can't maintain trespass or trover ag. B. for he has not the actual nor the constructive possession; but the action must be brot by B. the bailee. for the injury of taking from him. The reason in this case why the bailor can't maintain is, because at the time the injury was committed he had not a right of possession. The bailee has both the possession & right of possession for the time. A constructive poss. is a right of future poss. 4 T.R. 489. 1 Bos. & P. 486. 7 D. & R. 1 Bulst. 68. Esp. di. 570.

I would observe, that after the time of the bailment has expired in this case, the bailor after making a demand of the goods of B. & a refusal of redelivery by him, he may then maintain ag. B. For the right of possession now vests, & this refusal to redeliver, is a conversion after his right of possession commences.

If the goods of one, while they are in the possession of another by parol are given by the owner to a 3d. person, & S afterwards injures them or takes them away before the donee obtains the possession of them, the donee can't maintain an action against S. for he has no actual or constructive possession, for a parol gift without delivery does not vest the title. Str. A. 955. Esp. di. 577. - 5 Bac. 164.

But on the gift of goods, slight acts will amount to a delivery. As where the key to the store, which contains the goods sold, is delivered. So if the gift is delivered to the donees servant. But without either an actual or constructive delivery, the donee can't maintain an action. Comp. 294. & 296. Str. A. 955.

If the bailee delivers the goods over to a stranger, the bailor can maintain the action in the first instance v. the stranger; for the case is a possession lawfully, as the goods were delivered to him, by one who had the right of possession. But if a demand is made by the

bailor, & he produces sufficient evidence of ownership, then a refusal will subject the stranger, because detainer after the demand is a conversion. 1 Roll 607. 1 Bac 242. Fitz. na. brev. 87.

Is there any general rule to determine when the bailor has the right of possession & when he has not? Yes. the rule is this — Where ever the bailor has a right to countermand the bailment, there he has a right of possession & may maintain an action. In the case of a borrower, the bailor has no right to countermand, till the purpose of their delivery is accomplished. In case of a depositary he may countermand at any time. In case of goods bailed for hire he has not the right of countermanding, untill the agreement of the parties has been fulfilled. In case of a pawn he has no right to countermand, till the debt is paid.

The right of countermanding always exists as to bailees of 5th & 6th kinds, for these bailees are acting as servants & I have a right to control my property at any time, in their possession. Suppose E.g. I deliver my cloth to a tailor to be made into a garment. I may retake my cloth at any time, if the garment is half made. But the tailor in such case has a right to his full wages. After countermand the right of possession is in the bailor. Thus far of the bailors right to maintain actions against bailees & strangers. — —

It is clear that 1st bailees may maintain an action against one who injures or takes a bailment out of his possession wrongfully. Ans says Mr. E. I conceive all bailees have this right. — As common & special carriers, an agisting farmer, pawnees & borrowers, factors, &c. all may maintain actions. L. Ray 742. 2 Bur. 1210. 33. Stra. 505. Salk. 443. 5 Bac. 165.

I have said that any bailee might maintain an action in

the case supposed. – But it is said that the ground of this right "is in the bailees liability over to the bailor"; & hence it has been doubted whether a depositary can have this action, because he is not liable over to the bailor. 5 Bac. 164. 5. 262. 13. 6 Co. 69. 11 Inst. 89. Sid. 438. 1 N. P. 89. 92.

Now, says Mr G. I apprehend the reason assigned in the above case is incorrect, & if not, the inference drawn from it is illegitimate. – 1. It is not true that the bailees liability to bailor is the ground of his right to maintain an action ag.st a wrong doer. – But I apprehend the ground of this right is the qualified property every bailee has in the bailment. Now if this liability is not the sole ground, then the inference is incorrect; & even allowing it to be the sole ground, still a possible liability may exist in every case, & of course the right be co-extensive. – A special property is a legal right; but a legal right in one, is utterly inconsistent with the same right in another. It is absurd to say there is a legal right without a remedy; & here by the supposition, there is a right i.e. of possession in the bailee. Now in the case of a finder, Justice Lee expresses himself thus; "a finder may well maintain the action; because he has such a property as will enable him to keep the thing against all, but the true owner, & hence he may maintain trover". No question but a depositary has the same degree of property as the finder. 1 Sra. 510.

It is well settled that if a servant is robbed he may maintain an action ag.st the Hundred for the goods. Now here the servant has no interest, tho he has a right of possession ag.st all but the owner. He is not liable over to the owner, hence his right of possession is the ground of his right of action. Cont. 263. 4. Cowp. 629. 12 Mod 54. –

It is also laid down that the servant may have an appeal of robbery against the robber; the reason governing here, cant be on account of his liability over to his master, for he is not liable over. 13. Co. 69. –

Again, Buller lays down the rule, without any qualification, that a special property is sufficient to maintain trespass or trover. Bul. N.P. 33. or 83. 7 T.R. 390.

It is also determined that if a house is blown down the lessee may maintain an action ag. any one, who takes away the timber or materials of the house, because of his special property or his right of prospect, till the expiration of his term. Bul. N.P. 33.

It is also decided that an uncertificated bankrupt may maintain an action, after the act of bankruptcy committed, against any wrong doer to property he acquires after becoming a bankrupt. Now he has none but a special property, & it may be taken from him by his creditors, at any moment. He certainly has no more property than a depositary 7 T.R. 391. or 391. 1 Bos. & Pul. 44. —

I have gone thus far to shew that the reason why a bailee, in any case, may maintain an action, is not on account of his liability over to the bailor. — But read on. —

But if the possible liability of this right the bailee is the foundation of this right, still, this is a matter of uncertainty & how is to be determined between the bailee & wrong doer? And if the wrong doer is excused, because the ct. say that the bailee is not liable to the owner, why then if the bailor sues the bailee he may be found liable to the bailor, because the record in the former case cant be given in evidence in the present.

A depositary may be liable over to bailor for the wrongful act of another or he may not, & so of a common carrier. So that the liability of common carriers over to bailor, is not the ground why he may have an action ag. a wrong-doer. For when the bailee sues a wrong doer, you cant go into the inquiry of his liability to the bailor. It is a consideration which cant be used by the 3d. wrong doer to his own advantage. — — — further

Further, policy requires that bailee should have a right of action — for suppose I should deposit goods with a person in Eng. or New York. Now I am at a distance & a speedy remedy is required & if the depositary can't maintain an action v. a wrong doer, I may loose my goods. I am therefore fully convinced, says Mr G. that a lawful possession will give a right of action in this case, & that the person, in whom the special property is, is the owner of it, against all persons but him who has the general property. — It is also settled if bailee deliver the goods to a stranger, the latter may maintain an action v. a wrong doer to the goods. This is a distinct rule but it directly comports with the doctrine I have been endeavoring to establish. 1 Roll. 607. 1 Bac. 242. 5 D. 260. Comyns 112. 129.

An auctioneer may maintain an action, for goods sold by him on a contract, as auctioneer; even tho the purchaser well knew that the goods sold belonged to another. 12 Mod. 8. 12 D. 592. 12. 13 Mod. P. 130 So also of a Factor.

Now it is clear that a common servant can't maintain an action on a contract he makes for his master. The case of Agents & Factors stands on a distinct ground. Here the principal is generally unknown, & they sell in their own name.

In most cases, bailor or bailee may maintain these actions. Bailor is sometimes prevented, as I have before stated, for want of possession either actual or constructive, as when he has hired, or bailed a thing, for a certain time limited. It is a rule, when either of them has the right to sue, a recovery by one bars the others action, for there can be but one recovery for the same wrong. 13 Co. 69. 1 Bac. 165. 263. 2 Roll. 564.

And as to the question, who shall have priority, when both sue, Holt says he who first recovers shall oust the other. But, says

Mr. G. I doubt the correctness of this rule in Roll. But I conceive he who first commences the action, shall have a paramount right of recovery. By first commencing, he attaches to himself a right, of which he cannot be divested by another. I conceive therefore he who first commences the suit, ousts the other of his right of action. 2 Roll 569. 2 Stra. 813. 3 Lev 44. 52. Ven. 61. Latch 123. 3 Bac 559 note.

If the bailor has recovered of the wrong doer, he clearly can't recover of the bailee, for he can have but one satisfaction. Cro. E. 24 or 35. Salk 11. 3 Lev. 124. L. Ray 1291. 4 Mod. 68. 5 Bac 280 note 28. Cro J. 657. 1 Bac 48.

And I conceive, says Mr. G. that if the bailor commences his action ag. the wrong doer, he waives his right of action as ag. the bailee, tho I find no authority to this point, yet I think it follows that if the bailee is ousted of his right v. the wrong doer, by the bailors first commencing against him, he shall not afterwards be subjected. If the former rule is true, this is so in justice. There is an analogy between this & the case of rescuers. Thus suppose a person is committed to prison & is rescued. Now the plff. or Sheriff may sue the rescuers, & the plff. may sue the Sheriff or the rescuers; & if he commences an action ag. the rescuers it bars an action ag. the Sheriff. Esp. Di. 610. 12. Cro E. 77. or 169 or 109. Hob. How 98. Salk 248. 12 Mod 663.

But on the other hand if the bailee first commences his action ag. the wrong doer, he makes himself liable over to the bailor at all events. For I go upon the ground that the commencement of an action by one ousts the other of his right; & if that rule is reasonable & law, this certainly is; if I was incorrect then I am now. — — — .....

I said that there could be but one recovery for the same thing or wrong, still the bailee may have a special action on the case for the injury done to him tho the bailor has recovered full

value. Thus A lends a horse to B. & C. wrongfully takes him; Sues C. & recovers the full value, still B. may have has an action agt. C. for the special damage done him. Wherever there is a damnum cum injuria, an action will lie; it is so in this case. 3 T.R. 615.

If the bailor himself takes the property from the bailee, before he has a right to it, the bailee may have a special action on the case ag. him. It is my opinion, says Mr. G., that he cannot have trespass or trover ag. the bailor. 13 Co 69. In this authority it is said that he may have trespass or trover. I think it is not correct. J.G.

If the bailee delivers the goods over to another, contrary to the orders of the bailor, he is ipso facto guilty of a conversion, and trover will lie ag. him; tho the time for which they were bailed has not expired. 4 T.R. 260. Esp. Ca 580.

Bailor can generally maintain no other action ag. the bailee, but, from a trespass on the case; but this may be in three forms, 1st. for negligence, 2nd. for detaining &c. 3d. for assumpsit, express or implied. Trespass ~~from~~ will not in general lie, because the original possession was lawful. 1 Wils 282. Bul N.P. 72. 3 Bac 237. Cro J. 244. Cro E. 781. 2 Wils. 319. 3 East 62. 4 Co 146.

If however the bailee wantonly destroys the goods, the bailor may have trespass. As if the bailee purposely kills the horse bailed to him. Now the bailee by his misconduct has divested himself of the character & rights of a bailee, & the contract of bailment is destroyed. 1 Inst 57a. 8 Co 13. b. 2 T.R. 465. 3 Keb 140. b. 2 Roll 555.

Pitts.

October 9. 1812.

Innkeepers. October 10. 1812.

Inns are public houses of entertainment for travellers; the keeper of the house is called the host, & the person entertained the guest.

At common law, any person may lawfully exercise the employment of an innkeeper, unless it proves inconvenient to the public. At common law they may be established, without license from any public authority, by the mere voluntary act of the party. But he who assumes the character of an innkeeper, by hanging out a sign &c. at once made himself liable to all the duties of an innkeeper. 3 Bac. 1789. 1 Roll. 84. Palm. 374.

But from the inconvenient increase of the number of inns, they may become nuisances to the public; & those who set up inns, so as to endure the increase or inconvenient, may be indicted for a common nuisance. 4 Bl. 168. 2 Hals. P. C. 174.

A disorderly inn, is also a nuisance at common law, and may therefore be a ground of indictment against the host. 4 Bl. C. 168. 1 Chitt. P. C. 193. 225.

What in England, are called ale houses cannot be established except by license, according to the Stat. 5 & 6 Edw VI. 1 Hal. 99. Fulk 45.

In town all inns or taverns are established by law, and no one there can set up an inn, until he has a license so to do. This license is obtained for one year only. It is granted by the Court of common pleas, at the recommendation of the civil authority, constables, select men & grand jurors of the town where the applt. usually resides. And it is penal, for one in this state to establish an inn without license first obtained. Stat. Con. 64 C. 6.

If an innkeeper is delinquent or disobeys the laws relating to Inns, this license may be suspended by the civil authority &

select men of the town ille the next Sessions of the Ct. of Common Pleas, & they can then deprive the host of his license or continue it to him, at their discretion. Stat. Con 643. Notwithstanding a power like this in the civil authority &c. the common law remedy still remains.

The chief duties of innkeepers extend only to the entertainment of travellers & the keeping their effects. 4 Co. 32. 3 Bac. 180. 1.

If an innkeeper refuses to entertain a traveller without sufficient cause, upon a reasonable price tendered, he is liable not only to an action on the case in favor of the traveller, but he may also be indicted. An innkeeper makes an implied contract with the public that he will entertain all; his refusal is therefore made a public offence. But upon sufficient cause he may refuse, for the law will not compel him to do that, which it is impossible for him to do. As if house is already full, his family sick &c. The law is very willing to admit excuses, but they must be reasonable ones, not grounded in the caprice or humor of the host. 4 Bl. 168. 1 Hawk 125.

The innkeepers care & oversight does not extend to the person of the guest, but only to his effects. Thus if the guest is beaten or the host incurs no responsibility. 8 Co. 32.

But tho the hosts care does not extend to the person of the guest, still if he furnishes him with corrupt wine or unhealthful food, he is liable both to an action in favor of the guest & also to an indictment. 1 Ro. A. 95.

The duty of a host, with respect to the effects of his guest, is as a bailee; & a bailee of the 5th kind. Espinasse in his digest, considers an innkeeper as a bailee of the 2nd class. Esp. Di. 625. But such classification is manifestly incorrect. Buller classes him

under the head of mandatum. This Mr. G. thinks is also incorrect for a mand. recieves the goods bailed to him gratuitously. Such bailment is always to a private person, not to one in a public employment. Again, in some cases, as in the case of horses & cattle the innkeeper does not bestow his care & trouble gratis. Neither, I think, can his care over his guests inanimate effects, be considered as gratuitously bestowed, for he obtains his pay out of another part of the contract.

This bailment being reciprocally advantageous, according to the general rule, he would be liable only for ordinary neglect; but by the policy of the law, the innkeepers liability, is further extended. The same reasons apply here, in regard to the extension of his liability, as were given in the case of common carriers.

The host is clearly liable for any loss occasioned by the act of his servant in any way. For he is bound at his peril to procure honest & careful servants. 8 Co 32. 3 Bul. N. P. 73. 1 Bl. L. 430.

So also if the goods are stolen by a stranger, the innkeeper is liable, & it is not material how much care he uses, for he is liable, at all events, for theft. Cro. J. 189. 224. 8 Co 33a. Jones 134.

There is an Exception to this rule; as if the goods are stolen by the guests own servant or traveling companion; for in such case, he brings his own knave along with him; or if they stolen by one, whom he desires to lodge with him. Here the theft is committed by his own fault. Cro. E. 285. Esp. di. 62. 8 Co 33a.

It seems that innkeepers are also liable for all common acts of robbery; & the law will make no allowance for the fact that the force was irresistable. If this rule is reasonable as to common carriers, it is doubly so, as applied to innkeepers, for they may better guard against force. The rule in both cases is founded in policy. 8 Co 32. a Rom. 9. Jones 135.)

Innkeepers.

On examination of this subject, I expected to find the rule distinctly laid down that innkeepers liability was co-extensive with that of a common carriers, & that no thing would excuse him, except the loss was occasioned by the act of God or the Kings enemies. - This of course is now questionable. See Plow. 9. -

Lord Coke says, that the innkeeper is not liable, unless there is a default in him, or his servants part. This doctrine is expressly denied by Buller. It is not necessary that you prove any actual default of his or his servant. Coke rule is clearly not Law 8 Co 33 a. denied in 5 T. R. 276 Esp. Di. 626. 7.

The innkeeper is liable for those goods, which are infra hospitium, within the house. But this infra hospitium is construed to extend to his stables & out houses, where the goods of his guest are kept. 8 Co 32. b. -

It follows then, that if the property of the guest is moved by his own direction from the hospitium, the innkeeper is not liable for loss. But if the Innkeeper removes the goods of his own motion he is liable. If the guests horse is stolen from the stable, the innkeeper is liable; or if he puts him to pasture without the direction of the guest he is liable if he is stolen. But if he is put to pasture by the direction of the guest, the innkeeper is discharged from his liability, if the horse is stolen. - 8 Co 32. b. 1 Roll 4. 1 Bul. N. P. 73. -

When the horse is put to the pasture by the direction of the guest, the host is not liable as innkeeper. But if the loss happen by his own or his servants actual neglect, he is liable. As if in this case he should leave open the gate or fence &c by which means the loss happened, he would be liable on the ground of neglect, & not on that of Innkeeper. 1 Roll 4. 3. Bac. 131. -

Innkeepers.

And the law is so cautious of admitting exceptions to his liability, that the innkeeper is not discharged from this liability by his absence from home, his sickness or even his insanity. If he is sick or insane, this reason would be sufficient to authorize him to refuse the guest; but if under these circumstances the guest is received, he becomes liable to all loses in the house as if he was at home & in good health. It has by some been thot unjust that an insane host, should be made liable as innkeeper. But says Mr. G. insanity is a game that is easily played. The law has therefore thought it dangerous to admit it as an excuse. Furthermore, it is the duty of the family to provide enough, who are in sound mind to take care of the inn, else leave the employment. 2 Co Eliz. 622.

An infant cant be made liable as innkeeper; neither can he be charged in any contract of bailment. His privileges are to be preserved to custom. 1 Roll. 2. 3 Bac. 182

And if the key of the apartment occupied by the guest, & in which are his effects, is delivered to him, & he leaves the door open & the goods are stolen, still the Innkeeper is liable. But if the host requests the guest to keep the door locked, & he refuses, it is a question in the books, whether the Innkeeper is liable or not. But Mr G. thinks he would not be liable, for the request is as much as informing him that there is danger, & the trouble of locking the door when the guest passes out of his room is so trifling that he is bound to do it. So says Mr. Gould. 3 Co 33 a. 3. Bac. 183. 1 Lyer 266. Moore 78. 158.

An Innkeeper is liable for loss, tho he be ignorant of the kind or value of the goods entrusted to his care. This principle I believe to be correct. tho you remember I question'd it

when treating of a depositary. But the situation of these two bailees are entirely different. A depositary is a selected person in whom the bailee can put implicit confidence, & is not obliged to receive the goods. Not so with the innkeeper. He is a Manager to the guest & no one would travel were he obliged to inform every innkeeper of the precise contents of his portmanteau or trunk. 8 Co. 33. a. Moor 158. 5 T. R. 273. –

Now as to the question, whether the innkeeper would be liable in case the guest voluntarily & wantonly deceives him of the contents of his trunk &c. I think the same reasons would apply to discharge him as in the case of common carriers. If the guest voluntarily lies, let him suffer for it. For the host might doubtless care to have taken care of the property had he known its value, or had he been really ignorant of it. –

The innkeepers liability exists only in favor of travellers such as board at his inn at the usual price charged to travellers. It does not extend to neighbours, or to boarders at the common price of boarding in private families. Neither is he bound to receive his neighbours, or to furnish them with victuals drink or lodging. 8 Co. 32. b. 1 Roll 3. Stra. 275.

Neither is the Innkeeper regularly chargeable, in the owners absence, for the loss of goods for the keeping of which he receives no profit; for in his absence he is not a guest; yet the absence must be of such a nature as to take from him the character of a guest. As if a man should leave with an innkeeper, his trunk to be forwarded to him to New York, or to keep till his return, & the loss is occasioned by theft, notwithstanding, the innkeeper is not liable as such, but he is liable as a depositary. – 1 Roll 3. 338. Cro. J. 188. 5 T. R. 273. Pop. 179. – –

Bat

But if the innkeeper does receive a profit for keeping the goods he is liable, altho the owner has left the inn, in such a manner as not to be considered as a guest. As if a traveller should leave his horse to be kept for a certain time or for a certain purpose, the innkeeper would be liable for loss. Bro. 138. Salk. 388. 3. Bac. 184. - - -

The innkeeper has a two fold remedy to recover for his entertainment. He may in the first place detain the person of his guest for the whole bill, or he may detain that property, the keeping of which has afforded him a profit. But he can detain the property for no more than to satisfy for the keeping of that very property. As if a man seizes the guests horse, he can detain him for the expense he has incurred in keeping the horse, but he cannot for the expense the guest himself has made him, as for victuals drink &c. 2 Roll 85. Carth 150. Salk 388. And if the guest departs without paying his bill, he may pursue & take him, & keep him as a pawn, till he does pay. The innkeeper is a bailee of the 5th kind who has a lien. 3. Bac. 186. 2 Roll. R. 438.

But where the Innkeeper detains the horse of his guest, he must not use him. In this respect he is not like a pawnee, who is allowed to use the pawn to satisfy the expense of keeping. For the pawnee has the pawn by the voluntary delivery of the pawnor, but here the detainer is by the operation of law ag. the will of the owner. It is of the nature of a distress, & the law will never permit the distrainor to use the distress, & if he does he is a trespasser ab initio; so in this case. Mon. 827. Str. 556. - - - But if the Innkeeper voluntarily permits the departure of his guest, or the guests property, he has lost his right of lien & can never afterwards reclaim either his person or property.

Finis. - - Lit. A. Field Oct. 10. 1812.

(3)

The Action of { October 12. 1812 / Lecture 1st }

Covenant. By Mr. Gould.

I. Of the general nature of cov'ts & how they may be created.

This is an action founded upon a covenant, & claiming a recovery for some breach of it: for this reason it is, that we give it the name of "Cov. broken".

Covenants, contracts & agruments are sometimes used as synonymous terms; but they are not strictly so; for tho' every covenant is a contract or an agrument, yet every contract or agrument is not a covenant. A covenant is a contract or an agrument writ ten & sealed. A covenant may be, by indenture or deed poll. 1 Bac 526. Litt. 340. 1 Pow C. 244. Esp. 19. 266.

But tho' the covenant is made by indenture, an action may be maintained upon it, if it was sealed by the covenantee & the party bound, & not by the covenantor. Lutw 212.

The usual remedy for a breach of covenant is an action at law, for the recovery of damages. Still the action of Debt will lie upon a covenant, where it is for a specific sum, or when it may be reduced to certainty by an averment. Thus if A. cov'ts with B. to pay him 100£. Debt will lie upon such covenant. Or if A covenants with B. to pay him 2£ for every bushel of wheat he will deliver him, here by an averment as to the quantity delivered by B. the amount due may be reduced to a certainty, & the covered by an action of Debt. Lutw 1089. Bul. NP 167. 3. Sa. 427.

But tho the most usual remedy for the breach of a covenant, is an action at law, to recover damages, yet where the covenant is to do some collateral specific act, as to convey lands, &c could a dud &c the most common & proper remedy for a breach

of such covenant is by a bill in Chancery for a specific performance. 1 Bac 526. 1 Jon 27. 139. 156. I do not mean by this that an action at Law will not lie in such case; for it is a rule that you cannot obtain relief in Ch'y, unless you can recover damages at law.

But where a covenant entitles the covenantee to damages only, a bill in Equity founded upon such covenant cannot ordinarily be maintained; for a court of Law could do this; & further Damages are not to be ascertained by a Chancellor, it is the province of a Jury to do this. 2 Bro Ch'y 34. 1 P. Wms. 570. 1 Bac 526. 1 Jon 27. Thus suppose one covenants to pay a sum of money, or to deliver a certain quantity of personal Chattel as wood grain &c. a bill in Ch'y. cannot regularly be maintained upon such covenants, for the covenantee has an adequate remedy in a Court of law. Equity interpose for no other purpose than to give the party a more adequate remedy, than a court of law can afford.

Even in these cases however where the remedy lies in damages only, if the relief prayed is consequential or collateral to a ground of relief properly cognisable in a Ct. of Ch'y. the bill will be retained. Thus suppose A sues B at law for a breach of covenant. B. files a bill in Ch'y. for an injunction against this suit, on the ground of fraud. A may file his cross bill in Equity for a breach of the covenant, & if no fraud is discovered they will give damages to the covenantee for the breach. Eq. Ca. ab. 17. 1 Bac 69. 526. 2. Pow. C. 216. The above rule is sometimes couched in the following terms. "where a remedy lies at law, a bill of Equity will lie if a matter of fraud is mixed with the Damages". I have chosen the words in which I have conveyed this rule, because I think they convey the meaning with more distinctness. I here further observe that when the P. off at law is thus led into a Ct. of Ch'y to answer to a fraud, the mode which the

the English Chancellors adopted to decree the damages & so directed an issue at law to ascertain the damages. In some the practice is to refer the inquiry to a committee or commissioners. Auth. cited.

All covenants are divisible into two kinds.

1st. Covenants in deed . . . . 2nd. . . Covenants in law.

Mr. Gould thinks the following would be the better phraseology. Covenants Expressed & Covenants implied by law.

By a covenant in deed is meant an Express covenant, that is a covenant expressed in terms. As if A. leases a house to B. for one year & B. covenants to pay $25. rent, this is an Express cov. 4 Co. 80. Esp. 266.

A covenant in law is a covenant raised or implied by law. They are then implied covenants. Thus if A. demises land to B. for a certain time, the law raises a covenant that the lessee shall quietly enjoy the land during the term. & also that the lessor had a right to make this lease, so that if the lessee be evicted by an elder title it is a breach of the covenant. 1 Inst. 384. Esp. di. 266.

This division of covenants arises from the nature & form of the agreement. There is however another arising in a different way. As all covenants whether in deed or in law may be divided into real & personal. This is not a dual, but a Co division.

A real covenant is one where the covenantor binds himself to pass or appurtenant a thing real as lands tenements &c. As in the above case of covenant to lessee; this is a real covenant. 1 Inst. 139. Fitz. 343.

A personal covenant is one, which is annexed to the person, or which concerns the personalty only. Thus a covenant to serve as an apprentice; a covenant to pay money to deliver personal chattels &c. these are personal covenants. 5 Co. 16. 1 Fitz. 145.

Now as the former division arises from the nature and

form of the covenant, this latter division arises from the subject of it.

With regard to the creation of covenants, it is a rule, that no precise form of words are necessary. Any words reduced to an instrument under seal, which shew the concurrence of the minds of the parties or an agreement, are sufficient. Therefore the word, covenant or agreement need not be used. Thus if A leases to B. with these words annexed "B to pay so much rent." or "A. receiving so much rent.", or if the words are "he (B) paying so much rent." these are all considered as express covenants. Therefore it is a safe rule, that any words in a sealed instrument, importing an agreement, amount to a Covenant. 1 Bac. 219. 1 Roll 518. 1 Vent. 10. 2 Lev 47. 2 Mod 86. Cro E. 202. 657. 1 Pow. C. 242. In case of the above words being used, it is considered as an express covenant on the part of B. if he accepts the Lease thus written, & if he does not pay the rent as stated, an action will lie ag. him for a breach of the covenant. And it makes no difference whether the deed is poll or by indenture.

A covenant may be created as to a thing, present, past, or future. It is most generally in future, but not always. As if the grantor covenants that he has seisin, this is present. Some covenants that he (has) performed a certain act, as if he covenants with B. to convey to him lands, which he also covenants he has purchased of J. S. this clause will bind him whether the title is in him or not. Now the covenant is as to a thing past. but as I said, almost all covenants are future; as when the covenantor covenants that he will warrant, &c. in short all executory covenants under seal &c are future. Plow. Com. 308.

Covenants in Law differ from covenants in deed in this. Covenants in deed are founded on the words used in

the covenant, tho they are not the most apt & explicit; as the words "reserving so much" &c. but covenants in law are not implied from the phraseology, but from the nature of the covent. as expressed. Thus the words "I have granted" or "demised" in front is law that the grantor had good title. The law implies thus much in such case, & if the lessee is evicted the lessee may sustain an action upon these words. 4 Co 80. b. 5 Co 17. Carth 98. 2 Mod 92. Pdn. 388.

Sanders says Mr. G. that an action will lie upon these words before the lessee or grantee has been evicted, if the title in the lessor or grantor proves not good. For the implied covenant is, that the the lessor or grantor has a good title. & here the covenant is falsified & broken the very moment it is entered into; & I conceive, the action will lie here eo instanter, as well as in these cases where one covenants expressly that he has good title. 4 Co 80 b. Carth 98. Esp. D. 267.

But covenants in law are always restrainable by an express covenant in the deed. This rule follows from the maxim, "qui tacit consentire videtur". Thus suppose the lease is made by the words "demisi," still if there follows an express covenant that neither he nor any one under will evict the lessee; here the lessor is not liable on the words. The evident meaning is, that the lessor is not to be liable for an eviction by a 3d person, having an elder title. It amounts to no more than our modern releases or quitclaims. Yelv 175. 4 Co 80 b. Cro E. 675.

There is another rule so generally expressed, that it is very apt to mislead one. It is this. in a case of a lease under the words "granted & to farm let" that an action will not lie for an eviction by a Stranger. But the rule must certainly mean the tortious eviction by a Stranger, & not his entry under an elder title. If this is not the meaning of the rule, it is wholly irreconcilable with

every authority upon the subject. 6 vs E. 214. Esp. di. 268. 4 Leo. 80. The words dedi et concessi amount to a covenant of quiet enjoyment. –

A recital in a covenant of a former agreument, creates an express covenant, on which an action will lie. Thus if in a covenant between A & B. it is said "that whereas it has been agreed, or whereas it has been heretofore agreed between A & B. that B. shall pay" a sum of money &c – Now this confirms the parol agreument by relation & makes an express covenant. 3 Keb. 465. Esp. D. 268. 1 Leon. 22. –

But tho' technical words are not necessary to constitute a covenant, yet there must be some word or words, which import an agreument to constitute a covenant. Hence when in a lease, the Lessee covenanted to repair during the term, provided the Lessor will furnish timber. This is a condition precedent to Lessees obligation to repair; & is no covenant on the part of the Lessor. If however it had been thus "provided & it is agreed" &c that Lessor shall furnish timber. This is a covenant on the part of the Lessor; in the former case the proviso was a qualification of the Lessees covenant to repair; here it is a covenant importing an agreement & an action may be maintained upon it if he neglects or refuses to furnish the timber. 1 Roll. 518. Esp. D. 267. –

But by this it is not meant that a covenant cannot be created in form of a proviso, for it may be created in any form if an intention is manifestly to be found thereby. Thus if lease is made to one for life with a proviso that if the the Lessee dies within 20 years his Executors shall hold the term till the 20 years have expired. This proviso will be considered as a covenant. It cannot be considered a lease for the a lease is for a time certain. 1 Co. 155. 1 Roll. 518. Moor 478. Tho. Ray. 27. –

Covenant.

It is a usual practice in Eng. for covenantor to execute a bond conditioned for the performance of covenants in deed. These bonds extend as well to covenants implied in law as to covenants expressed. Thus A. leases to B. under the words "Dedi et concessi", which imply a twofold covenant & then executes a bond for the performance of these covenants, this bond extends to both these covenants & an action for a breach may be maintained upon the bond. 4 Co 80. b.

But wherever a stipulation is in the nature of a defeasance, it does not amount to a covenant in law; thus if a lease contains a clause "provided & on condition that lessee does such an act", this clause does not create a covenant on the part of the lessee, but it is merely a defeasance, a condition to defeat the Estate.-

It is a general rule, that where the stipulation in a deed is in the nature of a defeasance, an action in a court of law will not lie upon the condition of the bond; but a Ct. of Equity will sometimes compel the obligor to a specific performance. 1 Roll. 518. 1 Sid 48.-

October 13. 1812
Lecture 2nd.

II. Of the Construction of Covenants.

It is a general rule that covenants are to construed liberally, i.e. the meaning of the parties is to be sought, without so strict an adherence to positive rules as are necessary to be observed & followed in the construction of deeds, grants executed &c. Thus a fee simple can be created in no way except by inserting the word "heirs" in the deed. But no rules of this rigorous nature are required in the construction of covenants. The intention of the parties is sought.- 5 Co. R. 699. Plow. C. 140. 1 Roll. 419. 1 Inst. 45. b. 1 Bac. 339.-

In many instances even a literal performance of the covenant, will not be considered as a legal performance of the covenantor. Thus where the condition of a bond was, that the Defendant should before a certain day, deliver to the Plaintiff a bond, wherein the plff was bound to the Deft. Before that day the Defendant sued the plff on that bond & recovered, & at the day he delivered it up. This, tho the bond was delivered up at the day, yet it was no performance of the covenant; for it could not have been the intention of the parties, that it should be put in Suit. The covenant was in reality broken, tho literally performed. Bro. Ab. 1 Ed. 48. Esp. Ev. 270.

So, on the other hand, a substantial performance is a keeping of the covenant, & discharges the covenantor, even tho it is not a literal performance. Thus when a man bound himself, that his son (who was then an infant) should be bound such a day, buy a fine, or (infra annos nubiles) should marry covenantees daughter before such a day, & before such time the son buys the fine, or marries the daughter, & the fine is reversed for error or the son when he comes of age disagrees to the marriage, yet is the covenant well & sufficiently performed. 1 Leon. 52. Esp. Ev. 270.

Covenants being intended for the benefit of covenantees, by no act shall the covenantor be allowed to defeat the effect of his own covenant. Thus if a lessee covenant to leave all the timber which is growing on the land when he take it, & at the end of the term, cut it down, but leave it there, it is a breach of the covenant. Sir T. Ray 464. 126. 1 Sid. 238. Again. A covenanted with B. before such a day to deliver to him a piece of cloth, & before the day he wantonly injured it, this was

a breach of the covenant.. Again, where the Defendant covenanted "that the plff. should have all the grains made in the defendants brewhouse, for seven years," & the breach assigned was that Defe. had put hops into the grains, by which they were spoiled, and the cattle would not eat them. The action was held well to lie; for the evident intention of the parties was, that plff. should have the benefit of the grains, which by this means were useless. Tho. Ray. 464. Skin. 39. 40. 1 Bac. 429. 444. Ca. Pl. Di. 2. 1. And it has been gravely determined that a covenant "to pay £50." meant so much money! 1 Sid 151.-

When the words of a covenant are uncertain, it is a rule, "that it is to be taken in that sense which is most strong against the covenantor, & advantageous to covenantee." Therefore.. where the Defe. covenanted with the plff. that if he would marry his daughter he would pay him 20£ per annum, without saying for how long, it was held that it should be for the life of plaintiff (the grantee) & not for one year only. For such construction is most beneficial to grantee & against. grantor. 1 Sid 151. 1 Sm. 102. Ca. Pl. Di. 2. 1. 319. 1 Bac 539.-

If one covenants to do an act, as e.g. "to convey a piece of land before a certain day", & before the day he conveys it absolutely to another, the covenant is ipso facto broken & action will lie immediately, i.e. before the day specified for the performance. 5 Co. 21. a. 2 Co. 15. a. Moor 313. 323. All this says Mr. Gould, this principle seems to be well supported, still I cannot help doubting its justice or correctness. Suppose e.g. I covenant with J. S. "that on or before the 10th day of October 1813. I will convey Blackacre to him." & tomorrow I convey the farm to J. N. in fee; now an action will lie against me in favor of J. S. on my cov. immediately,

but

but what Judge can say, but that before the expiration of the time specified in the covenant, I may not regain the use of the land & be able to fulfil the covenant..

There are some cases in which an exception in a lease or grant will amount to a covenant, & others in which it will not. The rule of discrimination is this; where the lease is of a grave subject, except a certain part of it. this exception does not amount to a covenant on the part of the lessee that he will not enter upon the excepted part & occupy it. e.g. A leases to B. blackacre except such a particular enclosure. Now this is not a covenant on the part of the lessee that he will not enter upon such excepted enclosure; but if he does, the lessor will have a remedy against him the same as if a stranger had entered. This is not a thing derivable out the lessees interest. But contra, where the exception is of a thing in a profit to be derived out of that which is leased, the exception is a covenant that he the lessee will not enter upon it. Thus if I lease a farm with an exception of a right to pass thro' it, or a right of way over it, here the exception is a covenant that he the lessee will not disturb this my right; & if he does in any way, as by fencing it up &c. covenant will lie against him.. Cro E. 65. 699. 1 Roll 431. Cro Ch 232. Salk 196. Com. Dig. Chancery, letter E. Page 2. I am not certain says Mr. Gould that this last case amounts to a covenant unless the lease is by indenture; yet I think, he says, it will hold in the case of a deed poll.. 1 Pow. Cont. 238. & forward.

There is an established difference in point of construction between express & implied covenants. The rule is that express covenants are construed more strictly than implied ones. A man may without consideration enter into an express covenant

by hand & seal, to the performance of which he is at all events bound. As in this case, where a master of a Ship, by charter party covenanted to be at the port of Windsor in South Carolina by a certain time, tho it appeared that it was impossible that he could be there at the time, from Storms & other inevitable accidents; yet he was held to be liable on the covenant. Shubrick v. Salmon, 1 Burr. 1637. 3 East. 233. 8 T. Rep. 259. 2 Wm. Bl. 958. So also if Lessee makes an absolute covenant to pay 100 £ for the rent of the house leased, he is bound to pay this rent, even tho' the house has been burned down* at the commencement of the term. 2 Lev. 163. 3 T. Rep. 708. 310. 2 Vent. 147. 1 Ford. 366. — Quere, Can a Ct. of Equity in this last case, relieve the Lessee? There is very little authority to be found upon the Subject. You may see however 1 Ch. Cas 83. 1 Ford. 371. My opinion, says Mr. C. is that the Lessee is bound to pay all events.

But contra in the case of implied covenants, such accidents will excuse the covenantor. Thus, every Lessee enters into an implied covenant not to commit waste. Yet if the house thus leased be burned with lightning, or the trees blown down with a tempest, the Lessee is excused. 3 Burr. 1639. 1 Bl. 79. 1 Ford. 366. Doug. 259.

It is a general rule, that the performance of an express covenant can't be discharged by any collateral matter what ever. The case of the Lessee's house burned, as above, will furnish an example here. Esp. Di. 270. But the following are exceptions to the rule. — I. If a man covenants to do a thing, which then is lawful, & a Stat. comes & declares it unlawful, the covenant is annulled by the Statute. Here the Stat. makes the performance unlawful, & in such case, the theory of the law is they are impossible. Salk. 198. — 2dly. If a man covenants not to do a thing which it was then lawful for him to do, & a Statute comes which

* By Lightning

compells him to do it, the Statute repeals the covenant. But 3rd. If a man covenants not to do a thing which was then unlawful, & an act comes & makes it lawful; yet shall the covenant remain unrepealed.

Another general rule; that covenants are confined in their operation, so far as respects the subject matter, to that which is in being at the time of making the covenant. Thus, if in a lease the lessee covenants "to pay all taxes", this shall be construed to extend to those taxes only which existed at the time he covenanted, & not to a tax of a new species. 2 Peer. 68. 1 Vent. 223. 2 Raa. 1191. 3 T. Rep. 377. — How this rule is not founded upon any arbitrary principle in the law, but upon the very intention of the parties. — A covenant contrary to law, is void; this rule is applicable to all contracts. 4 Bur. 2225. Coup. 729. 341. 3 T. R. 57. 1 Pow. C. 164. 176.

If one leases a personal chattel to another, & covenants that "the lessee shall have the use of it during the term", it becomes useless for want of repairs; there has been a question whether the lessor has broken the covenant if he does not repair it. The better opinion, says Mr. C. I think is that the lessor is not bound to repair & therefore not liable. 1 Bac. 831. 1 Vent. 26. 44. 1 Sid. 429. 1 Saund. 321.

An assignment of a chose in action by deed, amounts to a covenant by the assignor, that the assignee shall have the beneficial use of it & that he the assignor will not by a discharge &c. prevent the assignee in recovering upon it. Thus if A. holds a bond ag. B. & by deed assigns it to C. this amounts to a covenant on the part of A. that C. shall enjoy the use of it, & that he A will not discharge or release B. from the bond. And if A. does discharge or release B. from the bond, he himself is immediately liable in this action. Salk. 125. 1 Pow. C. 317. 1 Ray. 638. 1242. 3 Keb. 304. Chit. on bills 109.

You observe I confine the rule to cases where the assignment is by deed. It must be by deed else covenant will not lie. But if the assignment is by parol the assignee will have a remedy, if the assignor releases the obligor, or enters into collusion in the collection of the bond. - 4 T.R. 690.

The usual practice in bon. when the assignor has released or discharged the obligor from the bond, to bring an action v. the assignor sounding in fraud; & if the assignee has given notice to the obligor of the assignment, an action of fraud will lie ag. him for accepting such release or discharge. - It is the English practice, in such cases, to apply to Chancery.

Covenants, like all contracts, are construed & are to be carried into operation according to their legal effect. - As if a creditor covenant with his Debtor not to sue him within a limited time, it is no discharge of the debt; & if the creditor sues within the time, this covenant cant be plead in bar to the action; but the creditor makes himself liable on the covenant, by so doing. Cro E. 352. 1 Show 46. 3 Lev. 41. 2 Vent. 10. 6 Mod 63. Salk 573. 2 Vent. 10 note. 1 Bos & Pul. 633. But contra, if the creditor covenant never to sue his debtor; this is a release of the debt & may be pleaded as such. 8 T. R. 170. 486. 2 Roll. 95. Cro E. 352. 1 Vin. 445.

The reason of the diversity is this; in the case of a covenant not to sue within a limited time; if this covenant were construed to mean a release for the time limited, it would be a perfect one; for it is well settled, that a personal right once suspended is forever gone.* But contra if the covenant is never to sue, here the covenant is a release & a perpetual one, for it evidently is the intention of the parties that the right of action shall be forever extinguished. To prevent a multiplicity of suits this covenant & the 3rd. paragraph on the next page. -

never to sue, is construed as a release, tho in form it is not one. For the law will not be so idle, as to allow in this case, the covenantor to sue & recover his debt & the covenantee to turn about & sue the covenantor on the covenant & recover just the amt. of the debt back again. It may therefore be pleaded in bar by the covenantee to a suit for the debt.

But if the covenant "not to sue within a limited time" makes a part of the instrument sued upon, as if it be endorsed upon it, it will prevent a recovery till the expiration of the time. E.g. A. makes a promissory Note to B. for £100. payable on demand, & there is endorsed upon the note, "that the promisee will not sue the note till the expiration of 12 months" no recovery can be had upon this note till the time endorsed upon it expires. The endorsement is to be taken as part & parcel of the note itself, & it shall be construed to mean the same as if it had been written in the body of the note itself "payable in 12 months, 8 T.R. 483. 6 Bac. 737. L. Ray. 490 & 690. 1 Lev. 152.

N.B. The rule that a separate covenant "not to sue within a limited time" &c. applies only to personal actions. Because the temporary suspension of a real right is not an extinguishment of it; of a personal right it is. 2 H. Bl. 4.

And a covenant by a Creditor not to sue his Debtor in a foreign country, is forever a local release, & is a good bar to an action brot in that foreign country. This question has been solemnly determined within a few years in Westminster Hall by Lord C.J. Mansfield. The case was this, the crew of a foreign Ship covenanted with the Master that they would not sue him for their wages &c. in any foreign country. The vessel sailed for England & on her arrival there the crew commenced

commenced suits ag. the master, contrary to the covenant, & it was determined that the covenant was a good bar to the actions. 2 Vk. Bl. 603. 671. —

I would here observe, says Mr. G. that a man cannot by any covenant or contract whatever, exclude himself from resorting to the proper Courts of Justice. Thus if the creditor shd. covenant with his debtor, that the overseers of the poor, arbitrators, or any particular persons or person should settle the claims between them, & that he the creditor would never resort to a Ct. of Justice, for this purpose, such covenant would be absolutely void, as against good policy. 2 Vk. Bl. 605. —

A covenant not to sue at all, one of two joint & several obligors is no bar to an action brought w.th the other obligor; & says Mr. G. I imagine it is no release to either. Such covenant is construed to mean only, that the party waives his right as ag.t the covenantee; the right is clearly not meant to be extinguished, for the covenantor reserves to himself the right of suing the other obligor. And he may sue the covenantee & recover, but he would be liable on his covenant by so doing. This is often done to prevent a multiplicity of suits. — But if the bond or obligation is joint & he covenants not to sue one, it is a release to both & may be pleaded as such. 8 Vi. Ab. 168. 5 Mod. 199. 11 Mod. 254. 12 Mod. 551. —

But contra, a release in form, to one of two or more joint & several obligors is a good discharge to all. Because it is an extinguishment of so much, as the person released, is bound to pay; — but he is individually bound to pay the whole bond or obligation and it may all be collected of him, such release tho' w.ch may well be pleaded in bar to an action against either of them. 5 Mod. 168.

But if a creditor covenants with his debtor, that

"that he will not sue him before such a day, & if he does that he the debtor may plead the covenant as a release or acquittance. & furthermore, that the debt in that event shall be forfeited"; - this instrument is a conditional release, & may be plead in bar if the action is brot before the day, & the debt will be forever discharged. For here there are direct terms of defeasance & discharge. 1 Roll 939. Carth 64. 210. Comb. 123. 1 Show 46. 330. 350. 2 Show 446.

October 14. 1812.
Lecture 3rd.

Covenants ordinarily used in conveyances.

In all deeds of conveyance, except releases or what are usually called Quitclaims, there are two Covenants express or implied. 1st. that the Grantor has a right to make conveyance. If the conveyance is of freehold it is a covenant of seisin, if it is less than freehold it is a covenant that grantor has title. 2nd - a covenant, which is here called covenant of warranty, & in Eng. a cov. of quiet enjoyment. Although there are no express covenants in the conveyance, still the words dedi, demisi &c are implied covenants of title & enjoyment. 4 Co. 80 b. 1 Roll. 519. 20. 2 Mod 92. In Quitclaim deeds no such covenants.

On a covenant of seisin the grantee may maintain an action before his dissesin, indeed he may sue as soon as the deed is delivered, for if the grantor was not well seised, the covenant was broken before the moment it was entered into; & it will be a sufficient breach if the if the grantee proves that the grantor had no title. Cro J. 369. 170. 9 Co. 60. Kirby 3. -

But on a covenant of warranty, or quiet enjoyment the grantee or lessee can maintain no action till he has been evicted. Cro. E. 917. . . . . In

Covenant

In an action on a covenant of seisin, it is sufficient to state as a breach, that covenantor was not seised. He need not state who was seised. If however the Grantor, shews *prima facie*, that he was seised, it then becomes necessary for the plff. to shew an elder or better title in another. If the covenantor shews no title he fails. Cro. J. 369. 4 Co. 80. Cro. J. 170. Esp. di. 299.

Covenant of seisin is broken by an existing incumbrance upon the land, unless the incumbrance is expressly excepted. Thus if one covenants seisin, & there is an existing mortgage upon the land this falsifies the covenant at once. I think this rule is true in Eng. as well as here. 3 East 495.

Covenantee in case of covenant of warranty must state in his Declaration the eviction & the eviction must be stated as under a claim of title or by lawful act, & under good & elder title; If he states merely he has been evicted by one under lawful title; it is not sufficient; for the evictor may have derived his title from covenantor himself subsequently to the covenant. The last clause, under good & elder title, is indispensable in assigning a breach upon this covenant. 4 Co. 80. b. Cro. J. 315. 1 Ch. Pl. 3. 6. 1 Mod. 292. 2 Vent. 177.

But if it appears from the declaration, that the eviction was under good & elder title, tho it is not formally laid, it is sufficient. But it must somehow appear, & it is always safest and most proper to assign the [illegible] formally. 2 Lev. 37. 4 T. R. 617. 8 Vin. 278.

But it is not necessary for the plff (grantee) to state in what title the eviction was made; i.e. it is not necessary for the plff. to state the title of the evictor whether of fee or tail, or from whom he derived it. It is sufficient barely to state the eviction was under good & elder title. 2 Lev. 37. 4 T. R. 614.

Sedgefield says it is necessary for the plff to shew what

title the evictor claimed. But if any thing more is meant in this observation than a necessity of shewing an elder title, it is abundantly overruled & most clearly is not law. S.N. 1 Sid 466. 2 Jon 177.

The reason why the eviction must be stated as under any title at all is, that the covenant does not extend to the tortious acts of others. The covenantor warrants the title, i.e. the enjoyment of the premises against all right & titles whatever.

Alledging that the eviction was by judgment of Court is not sufficient, & this for two reasons. 1st. The judgment is not conclusive & cant be given in evidence in this action, the grantor not having been a party. 2d. The judgment upon which he was evicted may have been obtained by virtue of a title from the grantee himself. Stra 400. Holt 34. 3 Salk 284. 4 Dy 619. Bro Eq Ca 4 Bro 80. L.

These rules apply only to ordinary covenants. For a man may be so unwise as to covenant vs the tortious acts of others expressly, & if he does the title of the evictor need not in any manner be mentioned. - Esp Di 273 4. -

But a covenant of warranty against the acts of a particular person extends to a tortious eviction by him as well as an eviction by claim of title. For when one covenants against all evictions by the acts of A or B or both of them; such covenant is construed to covenant title & possession against such persons, at all events. Holt 95. Bro C 212. Stra 410. 11 Coke 434.

But if the covenantor disturbs the covenantee, even by a tortious act, if done under a claim of title, or by such an act as appears to be an assertion of right, he is liable on the covenant. And in this case the covenantee need not alledge that the covenantor had any title whatever. This rule holds true when the covenant is expressly limited to lawful evictions. For if a covenantor

covenantor disturb the covenantee, I have broken my covenant, *it will not avail for me to say that the I entered, my claim was not good*. 1 T.R. 671. 2 Show 4. 25. Ep. D. 273. 302.

I will here remind you, as in analogy to the above doctrine, that an eviction by the Lessor suspends the rent; but a wrongful eviction by a third person does not. Comp. 242.

And the rule (viz. if covenantor breaks his own covenant &c.) extends to all persons who by operation of law are included in the covenant; as Heirs Executors Administrators &c. if these either of these evict the covenantee by claim of title they are liable. 1 Ven 25. 1 b. 2 Com. 504. Ep D. 302.

A covenant of quiet enjoyment, by Executor or Adm'r. is such, is confined to themselves & those claiming under them; i.e. the breach must be occasioned by some act of the Ex. or Ad. or some person claiming under him. Suppose E.G. the Executor makes a Lease of a chattel real, & covenants that the Lessee shall quietly enjoy it. Now this covenant altho' thus generally expressed, is restrained to his acts & those claiming under him, & he is liable only in his representative capacity. If therefore the Lessee should be evicted by one having paramount title with that of the Lessor testator the Exc. would not be liable. 1 Ab. Bl. 34.

In Eng. when the plff. recovers on a covenant of seisin, he recovers the consideration money & interest. When he recovers on a covenant of warranty, he recovers the consideration money, the interest & says Mr. T. Sappington his damages occasioned by the eviction tho' I find no rule in any of their authorities to this effect. — In Conn. where the plff. recovers on a covenant of seisin he recovers his consideration money & interest as in Eng. But on the covenant of warranty he recovers the value of the land at

*But if the act of the covenantee is contrary to the covenant & gives a right of entry to the covenantor, it is a breach of the covenant only.

land at the time of the eviction & the damages he has sustained in consequence of it, as the costs of defending the title. 1 Kirby 3. Hence, as you will observe, there is a wide difference in the recovery of the plff. upon covenant of warranty, in Eng. & in Con. The ground of the difference is this - in England the value of the land has been stationary for centuries, & as that is the case it is just that the plff. should have his money returned & the interest upon it. But here & in all new countries, the value of land is constantly fluctuating. It is therefore more just that the plff. should recover the actual loss occasioned by the breach, & this is exactly estimated by the value of the land at the time of his eviction. Thus suppose A. sells B. a farm of 100 acres for 500$. with covenant of warranty. Now this land, the real value of which at the time of purchase was worth no more than 500$. but 5 years afterwards, at the time of the grantees eviction, it has arisen to be worth 1000$. it is justice that he should recover so much of the grantor, & this will be the rule of Swan's case. -

On a covenant of seisin, I take the rule to be that the assignee of grantee cannot maintain an action v. the grantor, i.e. that a covenant of seisin does not run with the land. The reason is the covenant was broken if the grantor had no title) at the moment it was entered into; it is therefore a mere chose, or personal right in action in the grantee to recover damages of the grantor, which cannot be assigned. This principle was decided in the case of Taylor & Tilghman in the Sup. Court, in the year 1800, I think, says Mr. G.

But contra, the assignee of grantee, may undoubtedly have an action on a covenant of warranty, provided the eviction happened after assignment or while he was in possession. Here the

the covenant is not broken till the right of the assignee is violated. Thus A grants to B. with covenant of warranty, B. assigns to C. and C is evicted by D having a good & elder title. Now covenant will lie upon the warranty in C's favor against A. Bul. N.P. 158. 2. Esp. Dig. 295. 5 Co 16. b. 17 a.

(When an action of ejectment is brot by a stranger, to recover the Land) against the grantee, he ought for his own security, to give notice of such action to his grantor, that he may have an opportunity of coming in & defending the title. But the grantor is not obliged to appear in such case, & if he does not, grantee must defend alone. 3 Bl. C. 300 & 310. 1 Bac 532. 1 Inst 101. 365. a. In Eng. there is a writ of voucher used in such cases; & in Conn. notice is given the grantor by a kind of summons, which we also call a writ of voucher, issued by the court where the action is pending.

I observed, that this notice ought to be given the grantor for the grantees own security — because it is said in Conn. that if the grantee does not give notice, he cannot on being evicted, recover of the grantor, the special damages which accrued in consequence of the eviction. — Again, if grantor is not vouched in, he is not concluded by the judgment against the grantee, but if he is vouched in, he is concluded.

Quitclaim deeds, or deeds of release contain neither of the covenants of which I have been treating. Yet it has been supposed formerly, that covenant might be maintained v. the grantor of a quitclaim deed if he dy, and a debt imposed upon grantee. But, says Gould, I believe this doctrine cannot be maintained on principle, or the common law. Nor clearly will it lie. And it has been determined by the Court of Errors, that covenant will not lie for fraud in the sale of Lands. See Simon v. Thurston 2 Day 129.

Covenant.

If in an action of covenant against two, the plff obtains judgment by default or otherwise ag. one & it is afterwards barred as to the other by a special plea or by general issue, judgment cannot go against either. The rule is different in case of torts, for torts are not joint. Cro J. 134. Carth. 361. 1 Salk. 284. Buk. N.P. 188.

October 15th 1817.
Lecture 4th.

Covenants & other Contracts to pay money by Installments.

This subject is treated very confusedly in the books. The confusion arises from various causes. One is the books sometimes make no difference between different forms of contract whether it is bond, bill &c. nor any difference whether the sums to be paid are aggregate or not. I think the law is now well settled upon the subject.

On a penal bond, conditioned for the payment of an aggregate sum by installments, an action of debt lies for the non-payment of the 1st installment, when it falls due; & at common law the plff will recover the whole penalty of the bond; thus if the debtor enter into a penal bond with his creditor, conditioned, that if he the debtor pays one hundred dollars in six months & one hundred in twelve mo. the bond shall be void; Now at com. law if the first 100$ is not paid at the end of the six mo. the bond is forfeited & the Oblige will recover the whole penalty. 1 Wils 80. 1 Stra 515. 814. Cro J 558. Buk. N.P. 168.

But if a single bill is given for the payment of an aggregate sum of money by installments, an action will not lie till the last installment is due; & then debt is the action to be had. But here there is no penalty; there is no condition broken. The bill is for an entire sum, it is indivisible as to its remedy. If the plff could

sue each installment as soon as it fell due, he would have a number of actions of debt upon the same specialty, which in the very nature of the action is impossible. Lord Coke lays down the rule that if a bond is given, for the payment of money by installments, that an action will not lie till all the installments are due. One would suppose he meant a penal bond; but he cannot mean thus; he means a single bill. 1 Inst 47 b. - 292 b. 10 Co 128. Bul N.P. 168. 1 Vb. Bl. 548.

But when rent is reserved, payable by installments, the lessor may have an action whenever the installments fall due - tho there is no bond or bill in the case, & the stipulation may be by parol or by deed. Now you may ask, upon what grounds is this diversity founded between a single bill, & rent reserved. In the case of a single bill the rent is entire & cant in any way be apportioned; the recovery upon it, is only by action of debt, & this will not lie, unless the whole value of the bill is recovered. But contra where rent is reserved, it is considered as a part of the profits or issues of the land; each reservation is due, & hopes to accrue on the pay day, & there is no debt till that day arrives; & on the day the reservation creates a distinct debt.

As to covenants or promissory notes to pay an aggregate sum by installments, the rule is that an action of covenant will lie upon the covenant, or assumpsit upon the note for damages when the first installment falls due. & the pl.ff will recover as much in this case as is then due. He does not recover the whole amt. of the covenant or note, as in the case of a penal bond. Thus if one covenants to pay 1000$ by 5 yearly installments, an action of covenant will lie at the end of six months & he will recover 500$. but debt will not

lie, till the last installment falls due, & for the reason, which I have more than once assigned, that the covenant cannot be apportioned, & that in the action of debt the whole covenant must be recovered or no part of it can be. It is the same as to the note; the actions of covenant or assumpsit may be brot upon them for the damages then actually sustained. Cro C. 175. 3 Co 22 a. 4 Co 94 b. 8 Co 153. Cro J 165 or 105. Salk 165. Bul. N.P. 167. 8 I. R. Bl. 457. — A contrary doctrine in Cro C. 118. but it clearly is not law. —

If a covenant is made for the payment of several sums of money, where there is no aggregate sum is due, an action of covenant will certainly lie for the recovery of the first installment; & Mr. Gould thinks debt will also lie. As if one enters into a covenant, to pay at the end of one year 25£ & at the end of two years 25£ more, & so on, now there is no doubt but covenant will lie at the end of the year for the recovery of the 25£ then due; & the reason why I am inclined to think that debt will also lie at that time is, here is no aggregate sum included in the bond, or in other words the different sums are not aggregate. But the reason why you can't bring debt upon a single bill where the sums are aggregate does not apply here. Suppose then I enter into two covenants to pay, in one 25£ in one year, in the other 25£ in two years. Now debt will lie upon these covenants the moment the contents of them become payable, will I suppose, says Mr. G. that the circumstance of the covenants being written upon one or two pieces of paper will make no difference, & if the sums contained in one covenant are not aggregate, that debt will lie, whenever the installments, according to the terms of the covenant, become payable. 1 R. Bl. 550. Cro C. 7. 6. 807. Bul. N.P. 168.

If in a covenant for the payment of an aggregate sum by

installments, there is contained this clause "that on the non payment of any one installment, on the day on which it, falls due, the whole shall immediately become due" such clause is binding, & if any one of the installments are not paid at the time, an action will immediately lie, for the recovery of the whole bond or covenant. Chitty on Bills 212. 3.

I here observe, says Mr G. that in an action of covenant broken the plff. may assign any number of breaches he pleases. If covenants may be numerous, & they may all have been broken, he must then allidge the breach of them all, else he cannot recover upon them, i.e. he can recover upon those only, which he assigns to have been broken. But at common law in an action on a penal bond, the plff would recover for the breach of all the covenants, tho he allidged the breach of but one. the reason is, that on a penal bond, one breach will work a forfeiture of it as effectually as two or more: the assignment of more than one would be duplicity then. As, in the above case of covenant broken, suppose money is to be paid by four different installments & the action is not brot till the 4th installment has fallen due, in this case the plff may assign four breaches. 4 Bac 134. 5. 2 Vent 198. 1 Roll 112. Comb 29. 2 Wils 293. 3 Pa Ch 108.

In Conn. in an action upon a penal bond, which is given for the payment of an aggregate sum by installments, or for the performance of several conditions, the plff must allidge as many breaches of the condition as have happened; for the plff never recovers the whole penalty, unless he has been damnified to the full amount of it. Our Statute provides that a bond given may answer the penalty of the bond, down to the actual damage, the plff has sustained. Stat. Con. 354. And now in Engla-

by Statute 8 & 9 Will III. c. 10 the plff. may assign as many breaches as he pleases, & the Jury are to assess damages for such as have been broken. This Eng. Statute has introduced a new rule of pleading there, which exactly comports with our practice in Connect. 2 Wils 277. 8 T. R. 126. 2 Bl. R. 1111. 1016 2 Burr. 820.

I would again observe, that when at com. law, there was more than one breach assigned upon a penal bond, advantage could only be taken of the duplicity by special demurrer; for it is a fault in form only. Com. 297. 4 Bac 135.

What persons are bound by covenants.

It is a general rule that the personal representatives of the covenantor, as Executors, Administrators &c are implied in him & are bound without being named. Thus if A covenants to pay a sum of money at the end of one year, & dies before the time arrives his Exec or Adm. is bound to pay the obligation tho not named. 2 Plowm 192. 2 Roll. 819 1 Pow C. 128.

There is an exception to this rule; viz. where the act covenanted to be done is to be performed by the testator personally. Here the covenant is fiduciary. Thus if I agree to labor with A. for one year & die before the expiration of it; my Exec. or Adm. is not bound to perform this covenant by laboring themselves, or procuring any one else to labor. Again, in the case of a coventure of apprenticeship, the adm. is not bound to teach the apprentice on the death of the Master. The instruction was to be given by the master & him only. Bro E. 553. 1 Bac 533. Com. Dig. title Cov. Lit. C. Pl. 2 Mod 260.

But even in these last cases where the covenant is fiduciary, there is a material difference between the duty of the

Covenantors personal representatives to perform his covenant, & their liability for his non performance, for the Exec. or Adm. is bound if a breach of the covenant happens during the life time of the testator, for in such case he dies subject to an action by the covenantee, & the Damages of the breach may as well be paid by his representatives as by himself. Com Di. ti. cov. b. 1.

So also an ancestor seised in fee may bind his heir by his covenant. Thus if A. tenant in fee simple covenants to convey to B. & dies before performance, his heir will be compelled to convey the land; & the consideration money will generally go to the Exec. 2 Vern 213. Dyer 338a.

This is called a covenant real; & it is a general rule that covenants real bind the heir of the covenantor & descend to the heir of the covenantee. Now suppose in the above case, A. & B. had both died; the heir of B. would have compelled the heir of A to convey. Fitz 343. 1 Rol. 520. Bul. & P. 158.

The heir of the covenantee may sue upon the covenant tho not named, if the covenant runs with the land, & appears designed to continue after the death of the ancestor. Thus suppose the lessee covenants to leave the house in repair, & the land well fenced at the end of his term; & before the expiration the lessor dies, his heir may maintain an action for the breach of the covenant, tho not named. 2 Lev. 92. Skin. 305. Esp. Di. 294. 5.

The rule as to the heirs liability, as such, is very different in Comm. from what it is at com. law. See title Executors & Adm. &c.

At common law, an heir having assets, is bound, as heir, by his Ancestors covenant of warranty & seisin. But he is not liable, only to the extent of them. Suppose that A covenants with B. & warrants &c & dies leaving B his heir with assets. Upon

a breach of this covenant the heir is liable; - and if he has assetts sufficient to answer the whole damage of the breach, he is bound pro tanto i.e. to the extent of them. But if the ancestors heir's prop- erty comes by any way except descent he is not bound, no more than the honest purchaser in such case would be. He is liable upon the ground only of having assetts of the covenantor in his pos- session by descent. 1 Vent 175. 345.

I have been told, says Mr. T. by our Judges, that there for- merly was a decision in Conn. that the heir was liable upon his ancestors covenant of seisin. I doubt, says he, the correct- ness of this decision. For in this case, there was a claim upon the person of the ancestor, at the moment the covenant of seisin was entered into; & by a provision in our Stat. it is made the duty of the Exec. or Adm. to answer all claims & suits tanding debts of the person of their testator. Stat. Conn. 269. 275. 76. —

What covenants run with the land & what not.

There is a material difference to be observed between those cov- enants which run with the land & those which do not. -

All covenants in conveyances do or do not run with the the land; & those which do not are called collateral covts. Out of this distinction, there arises certain other distinctions as to the liability of the assignee or grantee. -

It is a general rule, that the assignee of a lease, tho not na- med, is liable for all breaches which happen during his pos- session, provided the covenant is one which runs with the land. But if the covenant does not, he is not liable. 17 ad. 345 1 Roll 521. Cro E. 457. 4 Co 80. 5 Co 16 b. 24 a. and b. -

The great difficulty then in understanding this part of our subject is, to be able to tell what covenants do run with the land?

If the thing covenanted to be done, or concerning which something is to be done was in esse at the time of the covenant & is part or parcel of the demise the covenant is said to run with the land. In other words. When the covenant relates to & is to operate on a thing in being parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed to the thing demised & shall go with the land & bind the assignee tho not named.

Suppose then e.g. the lessee covenants that he will keep the house in repair, the assignee is bound by this covenant tho not named; & he is liable for any breach which happens during his possession. The theory of the law is this; such covenants are considered as annexed to the land, inseparable from it, & therefore following it into the assignees hands tho not named. The assignee is bound in the last case tho not named, for the house is parcel of the thing demised and in esse at the time of the execution of the contract, so it runs with the land. Again, Suppose the lessee covenants to pay rent during the term, & before the expiration of it he assigns; the assignee is bound to pay, tho not named in the lease, for rent runs with the land. The issues & profits of the land, indeed, are not actually in esse at the time of the lease, still they are potentially in esse. 1 Roll R. 152. 3. Cro E. 683. Moor 357. Bul. N.P. 150 or 159.

But contra if the thing covenanted to be done, is not in esse at the time of the demise, it is not parcel of it, the assignee is not bound unless he is named.

As, e.g. if the covenant of the lessee be to build a wall upon the land demised, this not being in esse at the time of the demise, or when the covenant was made, it shall not extend to the assignee, unless he is expressly named in the covenant. 5 Co 16 8 per curiam Carey 3. Burr 1221. Cro E. 552. 1 Bac. 534.

Covenant.

October 16th 1812.
Lecture 5th.

So also a covenant is said to run with the land if it goes to the support of the thing demised, & such covenant shall bind the assignee tho not named. If then the covenant is to repair the house &c or to leave so many acres untilled, the assignee is bound in such covenants tho not named, for they are for the support of the demise, & are in esse at the time of the covenant. 5 Co 17. b. 24 b. Cro J. 125. 3 Lev. 233. 1 Kay 303.

Upon a covenant which runs with the land the assignee is bound, whether he is assignee of the whole premises or not. This rule is not universal however, but in the case where the covenant is for the support of the thing demised, I believe it always holds. Thus if A leases 10 acres to B. the covenants to repair, & afterwards B. assigns 5 acres to C. in this case C is bound to repair tho not named & is liable if he does not. 2 East 580. Cro C. 222.

When the assignee is named in the covenant, as if the lessee covenants for him and his assigns, he is bound to perform all the covenants which I have mentioned, whether they run with the land or not. The difference in effect between a covenant which runs with the land & one which does not, is this — When the covenant runs with the land & the thing is in esse & the assignee is bound tho not named; when the cov. does not run with the land, he is not bound unless he is expressly named. When he is named therefore he is bound to all covenants, for in such case the covenant is made for him, & by accepting the assignment he ratifies it. 5 Co 16. b. 1 Bac 534.

This rule however is confined to cases in which the covenant is to do some act that concerns the the thing demised. For tho the lessee does covenant, for him & his assigns, to do some act foreign to the demise, or which is not annexed to it, here the assignee tho expressly named is not bound. Thus

if in the case of a farm, the lessee should covenant for him and his assigns, to build a wall or a house on other land of the lessor, the assignee, tho named, would not in such case be bound to perform the covenant. Here the Cov. is collateral, unconnected with the lease - i.e. the act to be done is collateral, & can be assigned. Because the act to be done does not concern the demise the assignee cannot be more liable for such covt. 5. Co. 16 b. Cro. J. 438. 1 Freem. 352.

When according to the rules & distinctions now laid down the assignee is bound, he is bound only for rents incurred, or covenants broken during his possession. If therefore the lessee has broken the covenant before the assignment, the assignee is not liable for this breach. Suppose e.g. that at the time of the assignment there was one years rent due from the lessee - the assignee is not liable for this rent. The legal principle here is, that the assignee though bound by certain covenants of assignor, yet he is bound upon the grounds only of his possession, or privity of Estate between him & lessor. Suppose then, that the lessee himself breaks his covenant before the assignment, the assignee is not bound, for when the breach happens there was no privity of Estate on his part. The lessee's liability is not upon the ground of privity of Estate, but privity of contract. But privity of Est. is the only ground of assignees liability. 1 Freem 336. 1 Vond 356. L. Ray 338. 1 Salk 199. 3 Burr 1271. Doug. 443. 2 Wms 5 3.

The right of action, in the supposition last above, against the lessee cannot be transferred: & this consideration is an additional reason, why the assignee is not liable for breaches happening before the assignment to him.

Upon the same principle the assignee is not liable for breaches

covenant happening after he has assigned. Thus suppose the first assignee assigns to a second, after which rent is in arrear, the first assignee is not liable for this rent, upon the ground that the privity of Estate between him & Lessor is gone, the moment of the assignment. Carth 177. 1 Ford 350. Doug. 735. - And so strict is this rule of privity of Estate, that if the first assignee assigns over his interest in the term to a second assignee even the very day before the rent became payable by him to the Lessor, he (the first assignee) is not liable for any part of it. Thus suppose the pay day is on the 1st day of May, at which time there is one years rent in arrear, & the assignee assigns to a second assignee on the last day of April, the second assignee is bound to pay the rent in arrear. The reason of this is, there is no apportionment of the rent, nor a farthing is supposed to be due till the 1st day of May, at wh. time his interest in the term & privity of Estate is gone. 360 22. 1 Salk 81. 4 Mod 71. Doug. 461. Bul. N.P. 159. -

Again, if the assignee on the day before the rent becomes payable according to the terms of the Lease, makes a bona fide assignment of his interest to a beggar, & with the very intent of defrauding the Lessor, the first assignee can be made liable at Law for any part of the rent due, because (as before said) the rent is an entire, and not due till the very day. But here the Lessor is not without remedy, for if the covenant was express he may have an action against the assignee, or he may distrain upon the Land. 1 Bos & Pul. 22. Amb. 488. 3 Mod 122. 1 Lev. 72. 166. A contrary doctrine is laid down in 12 Mod. 324. 31. but this is against the current of Authorities &c. - but it is not Law. The reason of this rule is the assignee is liable only by virtue

of privity of Estate & not privity of contract. The liability follows the subject of the contract or covenant, & attaches the person who takes the Estate. But in the last case of an assignment to a beggar; if the assignment is a mere sham & not bona fide, for the purpose of defrauding the Lessor of his rent, the assignee would be liable; for in such case there would be a secret trust between the assignee & the beggar, & the assignee cannot be said to have parted with the privity of Estate. 1 Bos & Pul. 22.—

But in the case of an assignment to a Beggar as before a Court of Chancy. will compel the assignee to account for the rent while he enjoyed the land. Altho in strictness, according to legal principles, no rent accrued during his time, yet Equity will compel him to account, in a ratio to the whole time. i.e. if he enjoyed the premises for six months he will be compelled to pay half a years rent, & so in the same ratio.. For where justice requires there should be an apportionment, a Ct. of Eq. can do it.— 1 Vern 87. 2. 165. 1 Ford. 351. 3.

If the assignee is evicted of part of the premises only, the rent may be apportioned at law; for as to that part from which he is not evicted the privity of estate remains. The law cant apportion rent with reference to the sum to be paid, but it can with reference to the quantity of estate enjoyed. e.g. Suppose it was 100 acres assigned & he is evicted from 50 of it; he is compellable to pay rent for the enjoyment of the remaining 50 acres pro rata. The rule is the same as to the Lessee. 2 East 505. 360. 22 a. v. l.

In an action of Debt against the Lessee, the rule is the same. for debt is founded upon the privity of Estate — but contra if covenant is brought. this being founded upon privity of cont.—

in such case the lessee will not be compellable to pay any part.

The question has been raised in Eng. whether the Court of Chancery can restrain the assignee from assigning to a beggar or an insolvent person. There has been no decision upon the question. But says Mr. S. I do not conceive how they can put any such restraint upon the assignee, for the privileges of Law clearly give him the right of assigning to whom he pleases. See the Speculations upon the subject 5 a. 17 a. 335. 2 Atk. 219. 548.

It was formerly doubted, whether an express covenant by the lessee "never to assign" was binding or not. But this doubt is now removed & it is well settled that such covenant is binding. 1 Saun. 803. 8 T. Rep. 800. Esp. Ni. 270. - -

But such covenant is not broken, if the lessee's interest in the term is taken in execution by his creditors; for this is not an assignment by his own act; it is an assignment by operation of Law. His interest is transferred without his concurrence &, in common presumption against his will. 8 T. Rep. 57. 2 Eq. Ca. ab. 100. 1 Pyr. Ca. - Nor is such covenant broken by an underlease of part of the term. Thus suppose a lease is made to A. for 20 years & he covenants never to assign his interest, and afterwards underlets to B. for 10 years, this is not a breach of the covenant, for it is not an assignment. Again, a covenant by lessee never to assign is not broken, by his devising the term. Thus suppose a lease is made to A. for 20 years, & at the end of 10 he devises the remainder of the term. This is not an assignment, for the intention of the parties was that he & his representatives should enjoy the premises for the 20 years. 7 T. Rep. 89. 2 Bl. R. 705. 3 Wils. 234. -

I will once more remind you that the general rule in

the case of an assignee is. that he is liable for those breaches of the covenant only which happen during his possession - & thus far of the liability of Assignees. -

With regard to how far the lessee or assignee is charged in covenant, there is a considerable difference. For lessee has, from his covenant, both a privity of contract & of estate; & though he assigns & thereby destroys the privity of Estate yet the privity of contract continues & he is liable in covenant notwithstanding the assignments; but the assignee comes in only on privity of Estate & he therefore is liable only while in possession. Doug: 736. 441.

But with regard to the lessee it is a rule that he is always liable for breaches upon his express covenant, whether they happen before or after assignment. For in such case his liability arises not from privity of Estate but from privity of contract; & if he expressly binds himself in covenant to pay rent for twenty years, he is bound whether he assigns or not. 2 Co. 22 b. 23 a. 4 T. R. 98. 100 Doug. 443. Salk 199. 1 Vb. Bl. 434.

If the lessor has accepted the lessees assignee, for his tenant, as by accepting rent from him, or doing any other act recognising him as his tenant, he (the lessor) cannot afterwards maintain the action of Debt against the lessee. The reason is, the action of Debt, at common law, is founded upon privity or Estate, which is here gone. Thus e.g. suppose lessor lets for 20 years & the lessee assigns, & the lessor accepts rent from the assignee, in such case the action of debt will not lie against the lessee. But this rule qualifying the liability of the lessee is confined to the action of debt; for covenant will lie against him, tho' the breach happens after assignment. Cro. J. 334. 1 Vb. Bl. 444. 1 Vent. 359. 3 Co. 23 a. 1 Vb. Bl. 439. - - - - - -

But

But, I repeat say Gould. that if the covenant is express, as to pay rent & the lessor may maintain an action agt. the lessee for any breach, tho committed after assignment, for the action of covenant is founded upon the privity of contract, and where the cov. is express this privity remains. Bul. N.P. 159. 176. Bl. 433. 434. 6 Mod 30. 5 22. 1 Salk 237.

But if the covenant is only implied by law the lessor cant maintain any action against the lessee after the acceptance of lessee assignee for his tenant. The reason is the privity of estate, & the original covt being implied only, the privity of contract is also gone. The lessee here has parted with all his interest & the lessor has accepted the new tenant. These implied covenants arise from the privity of the Estate, or from the nature of the conveyance; & by the supposition there is no privity of contract. 6 Mod. 522. 176. Bl. 439 note. 1 Sid. 447. - In 1 Salk. 241. 6. are all the authorities collected. -

Where the covenant is express then, the lessee is not discharged from his liability tho he has assigned & the assignee accepts. And when the covenant is express, i.e. such an one as binds the assignee, the lessor may have actions against both the lessee & assignee at the same time. Thus if the lessee expressly covenants to pay rent, & assigns the term, this covenant is binding upon, & the lessor may have actions against both. It is binding upon the lessee by privity of contract and upon the assignee because it runs with the Land. But in such case the lessor can have but one satisfaction; thus if he gets execution v. the lessee & prisoner & gets by virtue, for any more than the costs in his action v. him, the assignee may have an audita querela; & so vice versa. 6 Mod. 523. - - - - - - - - - By -

By the English Statute 32 Hen VIII. the grantee of the lessor has the same remedy upon the covenants, i.e. vs the lessee & assignee, as the lessor himself had at common law. At common law the grantee of the lessor had no the remedies, which the lessor had, neither could he have because he has no privity of Estate. But this Stat. gives him the same privileges, which before were confined to the lessor & his personal representatives. And by the same Statute, the lessee has the same remedy against the lessors grantee as he before had against the grantor himself. 1 Inst 215. Brod. 522. 3 Bac 22. 4 Bac. 274.

There is a distinction in the law between an assignee & a derivative lessee, or underlessee. A derivative lessee is one, who takes only part of the residue of the term, or in is one who assigns unto the lessee takes the whole residue of the term. An assignee, you recollect, is one who takes the whole residue of the term, as tenant to the lessor. Thus if a lease is made to A for twenty years, & he at the expiration of ten of them, transfers his whole interest to B. here B is an assignee. But if at the expiration of the ten years A leases to B. for any time less than the residue of the term, here B. is a derivative or under lessee. Sid. 405. Doug. 374. 3 Wils 234. 2 Bac. Ab. 766.

Now you perceive that when A in the above case, conveys his interest to the assignee, there is immediately privity of estate created between him (the assignee) & the lessor, if he is accepted by the lessor as his tenant. But in the case of a derivative lessee, there is no such privity of estate between him & the lessor. As to the lessor he is a stranger; the original lessee his Landlord. You will keep in mind, that the derivative lessee is in no case liable to the lessor upon the covenants of the lessee. 1 Brod 342. 2 Bac. 374. 438.

So also if the lessee mortgage the whole residue of the term, the Mortgagee is not liable on the covenants in the lease, to the lessor, unless he takes possession under his mortgage. For he is not privy to the contract, & is considered only as an incumbrancer. Doug. 438. The specific difference then between an assignee and a derivative lessee is, an assignment is an absolute sale of the lessees interest, but the latter is the creation of a tenancy under him. An assignee is a tenant to the original lessor, the derivative lessee is tenant to the original lessee. ----

October 3rd. 1812. Lecture 6th

As to assignees, I further observe, that they are liable upon the covenants, according to the distinctions already laid down, whether the assignment is actual, or whether it is by devise or by sale under Execution. That as to their liability it makes no difference in which of these ways they come into possession of the premises. Thus suppose, e.g. a lease for twenty years, to A. & at the expiration of ten the residue is taken by his creditors sold under their Execution to B. or suppose at the end of ten years A dies & devises to B. now in these cases B. is regarded as a kind of an assignee & is liable the same as if he had purchased. Doug. 177.

It is a point unsettled, whether an assignee for part of the premises only, is liable to the lessor, for his or any part of it. It is clear the lessee is liable for the whole, but whether the assignee is liable for the rent of his part, I say is unsettled. Comp. 776. Cro. E. 633. It seems there would be some difficulty in apportioning the rent, says Mr. G. & on this ground, it is my individual opinion that the assignee could not be subjected; tho I am aware there is a case where the rent is apportioned. -

If the lessee covenant, for him & his assigns, that he will pay the rent as long as they continue in possession of the premises,

and the assignee continues after the expiration of the term he is bound to pay the rent according to the covenant in the lease. Stiles 4 of 2 Com. Di 504 or 364.

There are certain other distinctions, with regard to the duties & the rights of the personal representatives, of the covenantor & covenantee.

I have already observed that the heir may be bound by his Ancestors covenant, if he has assets; & now further observe that in an action on a covenant running with the land, against the Lessors heir, his infancy is no bar; it is true his pard may demur, i.e. suspend final judgment till he does arrive at age, but his infancy is no bar to the action: for his obligation here is derivative; he is not sued upon a contract which he has contracted in his infancy, & which in such case would be void, but his liability is devolved upon him by the operation of the Law; this however is nothing more than a rule in pleading, necessary to be kept in mind. 4 T. R. p. 77.

If A. covenants with B. his heirs & assigns, & the covenant is broken in B's lifetime; B's Executor shall have the action & not the heir, tho the heir is named & the Executor is not. For here a right of Damages had accrued to B. in his lifetime, & if he had sued & recovered, the damages would have increased his personal funds, which would have gone to his Executor. And this being the case, the Executor shall have the benefit of this right, to recover, as he would have had the damages themselves had his testator sued in his lifetime. Noy. 170. 34 Ass. pl. 20. 13 Co. 158. 2 Ab. p. 29 pl. 29.

But on the other hand, if a covenant real is broken after the covenantees death, his heir & not the Executor has the action. Thus suppose A. makes a covenant of warranty to

B. & after the death of B. there is an eviction. The action, in such case, shall go to the heir, for his right is now violated. The Executor is an entire Stranger. Bul. N.P. 158. 9. Salk 141. 2 Lev. 92.

Contra, &c. it is a general rule, That the covenantor's Executor tho not named, is always liable, for breaches happening in Covenantors lifetime. For here the right of action accrues to the Testator in his lifetime, & had it been brought it would have diminished his personal Estate; therefore the Executor shall pay the damages occasioned by such breach. And if the covenant was express, the action will lie ag. the executor, tho not broken till after the death of the Covenantor. The reason is that the covenant being express, the Executor is privy to the contract. Thus, suppose A. enters into an express Covenant with B. for quiet enjoyment of the demise; after the death of A. B is evicted, now the action must be brot v. A's Executor, as being privy to the contract. 1 Roll. 519. 2 Jur 14 a. Croc. E. 553. 2 P. Wms. 397. 1 Pow. 6. 128.

There is an exception to this rule, viz. where the covenant is fiduciary, i.e. where the act to be done, is, according to the nature of it, to be performed by the Testator himself. Thus if A. covenant with B. to labor for him for one year & dies before the expiration of it, my Executor is not bound to fulfil this covenant, by laboring himself or procuring any one else. Croc E. 553.

But contra if the covenant is not express, but merely implied in law the Executor is not liable, as being privy after the Testator's death. These rules, you will observe, apply only to covenants real. Suppose then that A. covenants with B. in the words "dedi concessi" &c. but enters into no express covenant of quiet enjoyment, & this covenant is broken

after the death of the covenantor; his Executor is not liable on this covenant. (N.B. The words "ex. di. concess." create in law an implied covenant of quiet enjoyment, as I have before stated.) The Executor is not liable, for he has no interest in the reversion. The right of action on these implied covenants is, founded on privity of Estate. The remedy then exists only against the heir. Leyer 251 a. Cro E. 152. 2 Com. Di. 563. 1 Bac. 533.

When the Executor or Administrator come into possession of the lease in their representative capacity, i.e. as executor or Administrator, they may be sued as assignee, for any breach which happens during their possession. Thus proving the Deft. Executor or Adm. is proving him ipso facto assignee. This is a rule in pleading only, & does not determine when the Exr. or Adm. is liable, but only that they may be sued in the name of assignee when they are liable. 1 Wils 4. Salk 309. Esp. D. 296.

The heir of the covenantor is liable for breaches accruing either before or after the death of his ancestor, provided he is named in the covenant & has real assets; but otherwise he is not bound. You recollect the general rule laid down before, with regard to Executors was, that he is implied regularly, in the person of the covenantor, whether named or not. But this rule is not applicable to an heir. Suppose then a covenants with B for himself & his heirs; the heir is bound in such case, if he has assets, for breaches happening as well before as after his ancestor's death; but if he has assets & is not named, or if he is named & has not assets in either of these cases he is not bound. 1 Ton 357. 2 Mod 365. 3 Co 3. 384. 2 Ch. Ca. 38. 3 Bac 27.

Covenant &c.

Covenants & bonds to save harmless.

A covenant or bond to save covenantee harmless, is a covenant or bond of indemnity to save him from some possible liability or loss. Such covenants or bonds are frequently given. Thus A indicts the D. B. procures C to sign a note as other obligation, jointly, with him to B. & it is usual, in such cases, for A the debtor to give C a bond to save him harmless from any liability he may incur in consequence of his signing the note or other obligation, to B. -

With regard to breaches of such covenants or bonds, it is a general rule, that they are not broken by the tortious acts of another. Thus, if the lessor covenants with the lessee to save him harmless, this covenant does not extend to the tortious eviction, or other wrong doer. Again, suppose that the lessor covenants with the lessee, to save him harmless from the payment of taxes rent; & afterwards the goods of the lessee unlawfully distrained for rent; the lessee can have no action ag. the assignee on the covenant of indemnity, for the acts is tortious. 1 Sid 400. 6 Mod 212. 7 Mod 35. 2 Lev. 37. -

This bond of indemnity is always taken by a Sheriff on his admitting a prisoner to the liberties of the Gaol yard, as it is called. Now if the prisoner escapes, the Sheriff may maintain an action ag. the prisoner, or his bond of indemnity, immediately; & whether he has been made liable to the creditor or not. And it is no plea for the prisoner to say that the Sheriff has never been subjected to the creditor. 6 Mod 53. 12 3. 1 Mod 210. 11. The escape of the prisoner, & the liability that the Sheriff thereby incurs is considered as a damnification.

Again. Suppose A. as surety, enters in to a bond with B. to secure a debt due to him from C. payable in six months from the date. and A. takes from C the debtor a counter bond of indemnity. Now if C. fails to pay B. the bond on the day specified, A. the surety may immediately maintain an action on his counter bond, ag. C. even although he has never been subjected to pay to the creditor one farthing of B's original debt. The reason of this rule is, that these indemnifying bonds are construed to save the surety harmless from all liability to pay the debt; and by the debtors not satisfying the bond on the day, on which it became payable, the surety is immediately liable to an action on that bond in the creditors favor. 3. Bulst 234. Salk 196. 5 Co 24 a. 2 T. R. 100. 640. 3. Do. 31 4 Do 7. 14 a 14. 5 Do. 30 7. 7 Do. 97. This point has been decided both in our Supreme Court, says Mr. but the last case was carried up to the Ct. of Errors & they established the doctrine as now laid down. Kir. 314. 1 Root 507. 2 Swift 156.

Here can you observe the debtor, if he does not pay at the day, is liable to two actions, one on his bond in the creditors favor, & also on the bond of indemnity in favor of the surety. Suppose then the surety sues & recovers upon his bond, & afterwards the creditor sues the Debtor & recovers all the money out of him alone? Here you see the debtor has been obliged to pay his debt twice. The rule in such case is, the debtor may have a remedy in a Ct. of Equity; they will compel the surety to refund to the debtor, what he formerly recovd. at law, upon his indemnifying bond. For it is the province, in such cases for a Court of Equity when subsequent events render it unconscientious for the surety to retain, to compel him to refund the money. 2 T. R. 104. 5.

It was once held that the action of assumpsit would lie against the surety in such case, to recover the money back. See the case of Moses & McFarland in 2 Burr. 1005. But Mr. Goldsmith this is not law. 7 T. R. 209.

A future liability alone on the part of the surety will not entitle him to an action ag. the debtor; but there is this material distinction to be observed; that if one having obligated himself as surety & takes a bond of indemnity after his liability to pay the debt accrues, he can't maintain an action upon his bond of indemnity till after he has been made actually liable on the surety bond. Thus suppose A. and B. his surety execute to C. the creditor of A. a promissory note, payable in one year from the date of the same, & after the expiration of the year B. takes a bond of indemnity from A. he can't maintain upon this bond till after he has been actually damnified in consequence of his signing the note. Again, suppose A. the debtor & B. as security execute to C. a note or demand, & at that moment B. takes a bond from A. to save him harmless, B can't maintain upon this neither, till after he has been actually subjected. For the indemnifying bond in both these last cases is intended, from the very structure of it, to guard the surety against all future liability; & when the liability existed before the bond was entered into. Salk 196. 2 Bulst. 234. 1 Rool 507.

If a surety takes no bond of indemnity & is subjected to pay the debt, he may maintain an action of indebitatus assumpsit ag. the debtor, for so much money paid out and expended for his use. But he can't maintain this action for mere liability; he can't recover till he has paid, and

then he will recover his actual damnification. But you may ask, why the diversity between this & the rule that allows the surety to maintain an action as soon as he has been made liable to pay? Parsons says Mr. G. that indebitatus assumpsit is founded upon the actual payment. The action can accrue till he has been subjected; whilst in the other case the construction put upon the bond of indemnity is, that the surety is to be save harmless, from all future liability to pay. In this last rule, the suggestion of payment. Comyns 525. 2 T. Rep 104. 5. 107. Rep. 597. 3 Wils. 14. 2 Chan. Rep. 180. 1 Kirby 134.

Here arises another distinction viz. If the surety has taken a bond of indemnity, & has been obliged to pay the debt he can maintain indeb. assump. ag. the debtor, for the money he has paid out; for he has taken a higher security; & it is a principle of law, that the law will not imply a contract for the parties, where they have made an express one for themselves. 2 T Rep 100.) 1 Coles 89. 117.

In some cases the covenantee after assignment may release the covenants; in others he can not. It is a general rule & common law applicable to obligations in general, that after the assignment of an obligation, by the obligee or the person who was to derive the benefit, may release if the obligation was not negotiable. But if it was he can not. In analogy then to this rule, if the lessor after he has assigned his interest, releases the lessees covenants the assignee may still maintain an action for breaches after the assignment; because the covenant is made assignable by the Stat. 32. Henry VIII. & if the lessor assigns his interest & rent becomes due & he sue

after the assignment released the lessee from his covenants to pay rent. In this case the assignee may recover the rent, notwithstanding the release. 2 Lev. 216. Cro C. 503. 1 Ton. 345.

But on the other hand, if the lease has been assigned by the lessee, he may, releasing the covenants of the lessor, oust the assignee of his remedy for breaches of them, if the release has been given before the action is commenced. Suppose e.g. the lessor covenants to make repairs to the amount of £50 per an. The lessee assigns his interest, & before any action is commenced he releases the lessor from his covenants. In such case the assignee cannot maintain an action against the lessor for not repairing. Cro E. 361. 503. 2 Roll 411. Esp. Dig. 308. But after the action is commenced, it is said that a right of recovery attaches in the assignee, so that the lessee can't release & have it effectual.

I suppose, says Mr. the reason of the distinction between the effects of an assignment by the lessor & those by the lessee, is, that the former are within the Stat. 32 Hen. VIII. & the latter are not. Covenants, in the latter case, are not assignable then, at least this must be the ground of the rule. But the covenants of the lessor to repair, runs with the land, & it is on that ground, I consider them negotiable by the general rule of common law. At any rate such a covenant is negotiable, & quere do. For the rule itself supposes that an action may exist & maintained by the assignee, before a release by the lessee. It cannot therefore, says Tould, see any satisfactory reason for the distinction. But the rules are settled.

It is a general rule that a release by the covenantee to the covenantor of all demands, the release being executed before the covenant is broken, is not a release of the covenant. Thus

A. leases to B. & the lessee covenants to pay rent annually. If in this case before the end of the year A releases all dem and sagt. B. this is no release of the rent. For at the time of the release A. had no dem and agt. B. for rent. There is nothing due till the expiration of the year, & is not "Debitum in presenti, solvendum in futuro". So a release of all actions & rights of action, is no release of a covenant not then broken. - But a release of all covenants, before the breach of them will discharge the cov'or.

*Bul. N.P. 166. 1 Roll. Rep. 518. Salk. 574. 1 Ld. Raym. 292. 6. Mod. 38. 6 Mod. 92.

Pleadings in Covenant.

I premise that my purpose is not to give you all the general rules, which are applicable to covenants, because there are many general rules applicable to this action & to the whole class of contracts. But my purpose is to give all those rules as are appropriate to this action, occasionally introducing general rules when they are necessary to illustrate or explain.

1st..... Of the Declaration. The declaration in the action of covenant broken, must always state that the covenant was by deed. This is an indispensable requisite. For whatever be the agreement, it is no covenant unless it be sealed, or in other words unless it be by deed. - Stra 814. Cro E 517. Cro C. 108. 209. -

But if an agreement in the form of a covenant is reduced to writing but not sealed, an action will lie upon it, but not covenant; the remedy is Trespass on the case

Any instrument written & sealed is a covenant, & it matters not what is its form.

The principal rules concerning the declaration of the plff. relate chiefly to the mode of laying or alledging the breach. As to this head

It is a rule, that when the covenant is general the apliga-

on

assignment of the breach may be general; i.e. that the breach may be generally assigned. As where the grantor covenants that he was well seized; an allegation that he was not well seized is a sufficient assigning of the breach.

If on the other hand, the covenant be particular or special, the breach assigned must be so likewise. As if A. covenants that he was seized of all the estate which J. S. had in certain lands, & that this was an Estate in fee simple, the plff. must state, the Defe. has not all the title, or that it was not a fee simple. The Declaration must follow the covenant in assigning the breach. Salk 139. 2 Ld Ray. 678. Holt 170. Esp. Di 298.

The most general assignment of a breach is in the words of the covenant, with a negative. As when the grantor covenants that he is well seized & the grantee declares he was not well seized. 9 Co 60. Bro. J. 359.

And the breach must always be so assigned as to appear on the face of the Declaration to be within the covenant. And it is not sufficient that it may be proved by extrinsic facts to be within it. Thus if the Lessee covenants not to cut down timber more than sufficient for necessary repairs, & the breach assigned was, that he cut down timber to the amount of 1000£. This is not a sufficient assignment. For the Court cant know that this was more than sufficient, unless it is stated in the declaration. Stils 5. Bro. E. 348. Doug 203. Esp. Di 299.

And if the plff. by subsequent words in the declaration narrow the breach first assigned, he must confine his proof to the breach as laid in the ~~Declaration~~ subsequent allegation. As if the Lessee covenants to use the Farm in a husbandlike manner, & the Lessee in his declaration states that he has not, but

on the contrary that he has committed waste, he must confine the proof to waste alledged, & he will recover for no other breach of the covenant. 3. T. Rep. 307.

Where the covenant contains a proviso, dispensing the covenant on the happening of a certain event, the plff is not bound to take any notice of such proviso in the declaration. The proviso is in the nature of a defeasance. It is like the condition in a penal bond. It is a matter of defence for the Deft. He may pray oyer of the covenant, & whatever it contains for his advantage, may be made use of for himself.

But if there is an exception in the body of the covenant, the plff must set it out, & negative it. i.e. he must shew that the breach does not come within the exception. The reason is, this is not a defeasance; but it is a component part of the covenant itself; & if it is not set out there is a variation between the real covenant & that declared upon. Thus, suppose the covenant was to repair all the fences on the land but one; & the declaration states that the Deft. covenanted to repair all the fences, & says nothing as to the exception, the variance is fatal. If the breach assigned is the not repairing 100 rods of fence, the plff must further state, that this is no part of the fence excepted. But if the covenant was to repair all the fences, provided that on the happening of a certain event, the covenant was to be void. This is a defeasance; no part of the covenant, & the plff is not to set it out. Tho. Ray 65. Esp. Di. 300.

If the plff assigns an inconsistent breach under a scilicet, this will be rejected after verdict as surplusage. As if the covenant was made on the first day of October 1812, & the plff in declaring alleges, that afterwards, scilicet, on the first

day of September there was a breach of the covenant, this assignment can not be rejected after verdict, & the declaration made out that on the 1st. day of October 1812 the covenant was made & afterwards &c. there was the rejection, broken &c." Saun. 232.

When the ~~covenant~~ is in the alternative, that is one of two things are covenanted to be done, the breach must be assigned as to both. For otherwise there does not appear to have been any breach. As if a covenant to pay A. 100$ within one year or convey him a piece of land. Now if A. alledges that I have not paid, without saying more, there is no breach assigned. It is necessary for him to state, that I have neither paid the 100$ nor conveyed the land. 1 Leon. 250. Esp. Di. 300.

There is a distinction to be observed between covenants that are substantially in the alternative, & those which in their phraseology are in the alternative, but in their legal effects are not considered so. With respect to the latter of these, the last rule does not hold. Thus if one covenants "to pay or cause to be paid". Now this in its phraseology is clearly alternative; but the breach is sufficiently assigned if the plf. alledges that the Defr. "had not paid," without saying "or caused to be paid"; for if Defr. had "caused to be paid," he had paid. Qui facit per alium, facit per se. 1 Stra. 229.

But where the ~~contingency~~ covenant is founded on the contingency of two things & that which shall first happen, it is not necessary for the plf. who alledges the contingency, to state, that it is the first; & he may declare on a breach arising from one of them, without making any mention of the other. Thus if A. covenants to pay B 100$ on the death or marriage of P. it is sufficient in declaring upon such covenant

to state the happening of one of the contingencies, without saying, that it was the first; & that if even the other had happened first, the declaration was still good; for the delay was the plaintiff's own. 1 Lord Raym. 132. Sayer vs. Ld. Orrery.

When the covenant is for an act to be done by the covenantor or his assigns, & the action is brot ag. the assigns, the breach must be laid in the disjunctive; i.e. the plff must allege that the act has not been performed by the covenantor nor his assigns. Thus A. lessor covenants that he or his assigns will repair. Now the breach must state that the lessor nor his assigns have repaired; for if either of them did repair, the action would not lie. Cro E. 348.

This rule does not hold, where the action is brought ag. the original covenantor himself. For if the action is not vs. him, then does not appear to have ever been an assignee. Thus suppose A. lessor covenants that he or his assigns will bestow certain repairs; now if the action is brot ag. the lessor, there is no need of the plff's laying the breach as to the assignee. For if the lessor has assigned & the covenant has been performed by the assignee, he may shew it & have judgment in his favor. Pra. 228. Salk. 139.

But on a covenant to a man, an averment that it was done to the Covie is sufficient. If there has been an assignment & the covenant has been performed to the assignee, the Deft. may plead it. This rule does not hold between, if the assignee brings the action. If an action in this case is brot by the assignee he must shew that the covenant has not been performed to the covenantee or himself & the distinction would be as above. 1 Salk 139. 3 Keb. 240 s. Mod. 135.

The last rule is laid down in a very perplexing manner by Lord Holt. It would seem, between this rule & the former one, there was a real distinction, i.e. that there was a different mode of pleading to be observed, when the covenant was to be performed "by" or "to" a man. But says Mr. S. if the cases are the same in point of fact, there can be no difference in principle. -

When there is a covenant to pay a sum certain, there can be no apportionment of the sum aid; the breach must follow the covenant, i.e. it must not be laid for a fractional part of it. As where the Plff. declared on a covenant, whereby the Deft. covenanted to pay the Plff. so much, viz. 10£ per Ton for goods imported, & assigned a breach in not paying for so many tons & one hogshead. Here the breach is ill assigned, in charging for the hogshead, the covenant being only so much per ton. In this case the Plff. cannot recover for the tons, which are entire, for he shews no breach. 2 Lev. 124. Allen 19.

But if the covenant (in the above case) had been to pay 10£ per ton & secundum ratam, the breach would have been assigned well. - But where the Plff. claims more than the contract will support, he may enter a remittitur for what he has claimed too much, & take judgment for the rest. provided the demand is not settled to a certain amount by the covenant, but depends on something extrinsic; for if the demand is so settled, as in the above case, if it be a covenant to pay 10£, there can be no remittitur. Salk 658. 1 Root. 105. But if the Deft. does not enter a remittitur, when he is allowed to the Deft. may defeat him by Demurrer, or after pleading mistrial, he may arrest the judgment.

Dec. Of the Pleadings on the part of the Defendant.

There have been a few instances in England where the defendant in the action of Covenant broken has pleaded generally that he has not broken the covenant. This has been the practice in Conn. & the correctness of it has never been questioned till within a few years; when at that time a Defendant pleaded thus generally to an action of covenant which Gilbert, Sayre, Gould & Edmonds. The plea was held ill on the Demurrer. And I conceive that this is never a good plea; for it always throws questions of fact to the Jury & generally does not form an issue.

Suppose that on a general covenant of seizin, the Plff. alledges that the covenant is broken by the Defft. & the Defft. pleads in general terms that he has not broken the covenant. Now under this plea, if it were good every principle of law upon the subject might be given in evidence to the Jury. But I said that such plea did not usually form an issue. For the Plff. alledges in his declaration that the Defft. has broken his covenant & the Defft. pleads that he has not broken it. Now here is not one fact presented & denied. The Defft. under this plea, could go into the proof that he never executed the deed, that the covenants had been all performed, or any other defence that he might choose to make. And from this plea the Court or the Plff. would never till on what particular he meant to rest his defence, till he introduced his evidence, & then he could not be confined to any particular defence, for if he failed in one he might proceed to another & another. See 2 Dunl. 166. 2 Bl. R. 1312. 3 T. R. 278 2 Mod 33. 311.

Covenant.

October 26. 1812.
Lecture 8th.

It is laid down in the books as a general rule, that when the covenants in a deed are all in the affirmative, the Deft. when sued upon the covenant may plead performance of it in general terms. But says Mr. G. this rule, in the unqualified terms in which it is laid down, is not law. It requires qualification; & in fact it holds in those cases only in which the things covenanted to be done, are in some way indefinite in kind & number. It is rather an exception to the general rule, which I conceive is directly the reverse.

Thus if a Sheriff covenants to return & faithfully serve all writs & processes lawfully directed to him. Upon covenant brought upon this, he cannot plead generally that he has performed all the covenants, for such plea embraces every matter & principle of law upon the subject, which must be judged of by the Court & not the jury; and this for the purpose of avoiding prolixity, for did he plead otherwise he would be obliged to state the time & the mode of serving & returning every process which had been directed to him during the continuance of the covenant, & this would as Lord Coke expresses it, "tend to infinite prolixity". Again. Suppose an officer enters into a Covenant to perform all the duties of his said office, & breach assigned is, that he has not performed all the duties &c. Now the acts covenanted to be done are in their kind & number so numerous, that the law allows allows him to plead a general performance, for the same reason as in the last case, because otherwise it would tend to infinite prolixity. Comyns 5 T.R. 4 Bac Ab. Thos Park Ca. Ab. Co Lit 303. The cases and authorities thus far, are for the rule as laid down above.

But says Mr. Blake the general rule stands to be this —

and that of performing in the plea any facts which are not positively denied. Comyns 5 T.R. 303. 5 T.R. 366.

that where the Defendant has covenants to do a number of specific acts, he must plead performance specially, i.e. he must plead the performance of each & every specific act; he cannot plead generally, that all he covenanted to do he has done. This, says Mr. J. conceives is the true general rule & the other only an exception to it. Thus suppose an Executor executes a covenant to pay all the Legacies contained in his Testators will. In an action on such covenant, the Executor can't plead generally his payment of all the Legacies; but he must plead specially the payment of every particular Legacy. Again, suppose A covenants with B. on the 10th day of October 1817, to convey a mess. to B. at the expiration of six months all the lands of which he, A. was possessed of in fee simple on the 10th of October. Now to an action brot against A. on this covenant, he must plead that he did convey to B on the day fixed one farm called Blackacre, one farm called Whiteacre, & then aver that these were all the lands of which he was then seized in fee simple, at that time. Cro E. 749. Cro J. 359 460. 1 Lev. 303. 1 Salk. 498. 1 Ld Ray. 753.

It is a general rule, laid down in a modern case, that a plea of performance otherwise than in the words of the covenant is ill. Thus suppose the case where A. covenants to convey all the Lands of which he was possessed in fee simple &c. Now ill. Def. pleads that he has performed all the covenants in the deed, such plea would be ill for it embraces matter of law to be determined by the Court. 1 Bos & Pul. 458. But says Mr. J. I doubt whether this rule is universal; for there may be possible cases, where the Def. may plead more justly in other words than those in the Covenant. It may be a general rule.

I have observed that the general mode of pleading in case

, affirmative covenants is allowed to avoid prolixity &c. For further authorities to the rule, you may see, Comyn. 575. 4 T.R. 753. 6 Co.E. 749. 916. 1 Bos & Pul. 243. -

This same mode of general pleading is also allowed in replications, assigning breaches of condition in actions on penal bonds, where the assignment of each particular breach, would tend to prolixity*. Thus where a man enters into a penal bond not to sell a certain article within such a time & such a particular place, plff. in his replication assigns that he had sold to A. to B. & divers other persons. This was held to be good; for it would be almost infinite to assign every breach of the condition, it appearing that he had run in the constant habit of breaking it. 8 T.R. 459. 2 Wils. 11. 3 Do. 535. 1 T.R. 482. 1 Bos. & Pul. 240. 2 Burr. 772. -

But where some of the covenants in a deed are affirmative & some negative, the Deft. can not plead Special performance to such as are negative. For one cannot plead Special performance to a negative covenant, it being not to do a certain act. But if the Deft. does plead Special performance to such covenant it is a fault in form merely & is aided by verdict, & the better opinion seems to be upon general demurrer too. The proper plea in such case is, a Special plea, that he has not done the act, he covenanted not to do. Cro C. 232. 691. 1 Inst 303 b. Comyn 576. Bac. 82. 91.

The following is an exception to this rule. If the negative covenants are void, & the affirmative are good, the Deft. may plead precisely as if there was no negative covenants in the deed. But it must appear upon the face of the covenant record, that the negative covenants

* The general mode of pleading is to assign that as breach, but where it may not be practical to assign an infinite number of particulars, the condition in his replication he must plead specially & show particularly wherein the Covenantor has offended, then the general mode is allowed.

on said Deputation & pleads Sheriff among other covenants, covenants with his Sheriffe not to serve any writs or other process above the sum of 10£. If the Deputy Sheriffe is sued upon this deed, he may plead performance, without noticing this negative covenant at all. For it is upon the face of it void. In creating a Deputy the Sheriffe cannot in any manner abridge him of the powers or emoluments arising from his office of Dep. Shp. Hob 13. Moor 855. 1 Sand 117. notis.

"When the covenants contained in a deed, are in the disjunctive, the Defendant must shew in his plea, performance which he has performed. Disjunctive covenants are such, as bind the covenantor to the performance of one of two things. Thus suppose A. covenants with B. "to pay him 100£ in one year from the date or convey Blackacre to him." Now to an action on such covenant, A cant plead "that he has paid B. the 100£ or conveyed the land." But he must shew in his plea which he has done. And if he pleads payment of the money, he must also shew the time & place of the payt. & the acceptance of the money. Or if he pleads the conveyance of the land, he must shew the time & place of executing the deed, & the acceptance of the same by B. Inst 343. b. 86. 133. Yelv. 205.

There is a contrariety of opinion in the books, whether pleading in a manner disallowed by the above rule is fault in form or substance. i.e. whether such pleading is ill on general or special Demurrer. I concur, says Coke, that it is a defect in point of form only. Suppose then in the above case, you plead payment of the money, but do not state the time & place of the payment, or the acceptance of it.

money. Now the payment I think is the substance and the manner of it is form only. But it is necessary in correct pleading to shew the whole of the circumstances attending the performance. Cro E. 232. 1 Leon. 311. 4 Bac. 91. 5 Com Dig. 82. 4.

When one covenants to do an act, which consists of a matter of law, as to execute a deed, to suffer a recovery, to levy a fine &c. he must not only plead special performance to such covenant, but he must plead quo modo, that is, he must shew in what manner he did the act. Thus if A. covenants with B. to execute a deed of bargain & sale of a certain article; to an action on such covenant, A. must not only plead that he did make the conveyance, but also that it was made by deed; that all the necessary solemnities in executing the deed of bargain & sale were observed &c. So also if the covenant was to suffer a fine, Deft. must shew in his plea before what court the fine was levied that it may appear whether that court had competent jurisdiction & whether the judgment was correct. The reason why the Deft. in these cases must plead the manner of his performance is, that the covenants consist of matters of law & must be shewn to the Court. (Com Dig. Pleader C. 10. Dyer 229. pl 60. 2 Bac. 92. Cro E. 560.)

The rule seems to be universal, says Mr. Gould, that when the covenant is to do an act, which must appear of record, must the performance must be specially & quo modo pleaded; & this for two reasons. 1st. he must plead quo modo because the covenant embraces matter of law. and 2nd. because the Court & not the Jury are to judge of the fact, which must appear of record.

Thus far of the plea of performance. The next is by far the most difficult to be understood and is.

Cover-

The pleadings of the Defs. to actions on Covenants of Indemnity.

There appear to be many arbitrary distinctions to this kind of pleading, says Gould; but the distinctions are generally found'd in reason. There is no doubt however but it is the most difficult to be understood of any branch of pleading in this action.

As to the Defts plea of covenants of indemnity, he may sometimes plead non damnificatus, i.e. he may aver that the Plff. has not been damnified in consequence of entering into bond of surety) by way of performance; and in other cases he must shew that the Plff has not been damnified & also shew how he has discharged him. The chief difficulty is then to distinguish when it proper to plead non damnificatus by way of performance, & when he must go further & shew how the Plff was discharged.

First. If the covenant is to discharge, acquit the covenantee from any particular thing, ascertained in the instrument, non damnificatus is not a good plea. Thus suppose a surety joins a debtor in a covenant to pay, & the debtor gives a bond of indemnity, & this indemnifying bond is sued, now non damnificatus is not a good plea to such action. 2 Co. 4a. Cro. Ch. 374. 1 Sand. 117 notes. Cro C. 4. 33. 914. 1 Bos & Pul. 639. note. In this case the covenantor must plead that he has discharged the covenantee from that bond, he must also shew how he has done it.

Contra if the covenant is to indemnify & save harmless, non damnificatus is a good plea, i.e. a plea that covenantee has not been damnified is a good & sufficient plea. 6 Co. 363. 534. 2. Wils. 126. 1 Sand 117. 53. R. 30 q. 10.

Now the reason of the difference between these two last principles, says Gould, I apprehend to be this. The first case the Defs. covenants to "discharge & acquit" & in this case

by the very terms of the covenant the Defe. is bound to do some specific act, amounting to a discharge or acquittance. But where the covenant is to save harmless; the covenantee may be saved harmless without any act done by the covenantor. He is of course saved harmless, if he has suffered no harm. But it cant be said he has been discharged & acquitted, unless the covenantee has done some act amounting to a discharge or acquittance. This says M.G. I take to be the true foundation of the distinction, & I agree it is pretty artificial. But there are others to be observed — thus —

If there is a covenant or bond to discharge or acquit in general terms, from all future suits, costs damages &c. non damnificatus is a good plea, for here the thing to be done is not ascertained in the instrument. The things to be done are future & contingent & it does not appear that there has been a damnification. This too is a distinction very artificial. Cro. C. 916. 6 Mod. Ath 374. 163. 4 Bul. 639. not. 5 Mod 244.

Further, in this case where the covenant is to acquit & discharge of all future suits costs, damages &c. in general terms, if there is a particular act covenanted to be done, to acquit & discharge the covenantee in the indemnifying bond, as by paying that bond, non damnificatus is not a good plea; but the Defe. must plead specially the performance of the particular act. The reason in this case is obvious. The covenantor in the indemnifying bond covenants with his surety the covenantee, that he will pay the sum by bond by such a day, now here it is manifest that the covenant in the indemnifying bond cant be performed without doing that act. The performance must be specially pleaded &c. 2 Co. 24. a. 1 Jones 115 not. 1 Bos & Pul. 638.

The rule is the same, if a bond is given for the payment of money at a certain day, non damnificatus is not a good plea, altho it appears that the bond was given as an indemnity & to save harmless. Thus if a Debtor gives his Surety a bond of indemnity (which upon the face of it clearly appears to be an indemnifying bond) in which he covenants, that he will discharge the covenantee from the surety bond, by paying that bond on a certain day, to an action on this covenant non damnificatus is not good plea, he must plead the payment specially. 1 Bos. & Pul. 638.

Again, I just observed that where there is a covenant or bond to discharge or acquit in general terms, non damnificatus is not good plea because the thing to be done is not ascertained in the instrument; still if the Defe. in this case will plead affirmatively that he has discharged or acquitted by performing the act, he must plead quo modo. And again if the covenant is to discharge or acquit from some thing indefinite, there non dam. is a good plea; but still if the Defe. will plead special performance he must plead quo modo. The reason in both these cases why he must plead quo modo, is that the plea of performance, specially pleaded, proves, under a positive act, & this act he can certainly shew in his plea. You may note this as a general rule viz. that in those cases where non damnificatus is a good plea, if the Defe. will plead affirmatively, he must plead specially & quo modo. The reason of this will is assigned above. 2 Bos & Pul. 363. 634. Cro E. 915.

If a covenant is for an act to be done by a Stranger the covenantor, must plead performance specially in those cases in which he would, had he been obliged to have

performed the act himself. Bro. A. 55960.

If the Defr. pleads non damnificatus where he has a right so to plead, a replication consisting of a general traverse is ill. It must shew the special damnification. 80. (9)
the D. h. pleads that the plff. has not been damnified; the plff. replies that he has; this is ill, for the breach no where appears. The plff. in his replication must shew in what particular he has been damnified; for if he has suffered any damage, it will admit of specification. Without thus specifying the issue is incomplete. 1 Lev. 83. 1 Sid. 444.

A Covenant in one deed can be pleaded (October 27. 1812.
in bar to an action on a covenant in another (Lecture 17th.
deed, unless the former covenant is in the nature of a defeasance or release to the latter. But contra a defeasance in a separate deed may be pleaded in bar, & undoubtedly a release may. For the purpose however of giving effect to the defeasance, or release, it is necessary that the deed in which it is contained should appear upon the face of it to have been intended to operate as a defeasance or release. That is, proper words must be used in the 2nd deed to denote that the intention of the parties was, that the 1st deed should be defeated. Thus if the 2nd deed recites the first & declares it void; or if there is a clause in the 2nd deed, by which the covenantee in first, binds himself "never to sue;" (which you recollect is a total discharge of the obligation) such words plainly denote that the intention of the parties was, the right of action in the first deed should be totally destroyed, & this 2nd. deed may be pleaded specially in bar to any action brot upon the first deed or covenant. 2 Burr. 217. Salk. 575. 5. Bro. P. C. 300. 623. Bro. 6. 426. 3 Salk. 298.

But contra to illustrate the general rule, that a covenant in one deed cant be pleaded in bar to an action on a covenant in another &c. Suppose the lessee covenants with the lessor to pay him 100$ per an. rent & the lessor in a distinct instrument, covenants that the lessee may retain 100$ per an. for repairs; now the lessee cant plead this latter covenant in bar to an action brot by the lessor upon the covenant promising to pay rent. The two covenants are distinct. The lessor does not say in his covenant to the lessee that the former covenant is void, nor does he covenant that he will never sue him, neither can it in any way be said that here are words amounting to a release. It is a distinct right of action in the lessee, if the lessor should compel him to pay the 100$ rent. They both then have separate rights of action upon their individual covenants, but one can never be pleaded in bar to the other.

But contra one covenant may be pleaded in bar to another covenant in the same deed or instrument, although the phraseology of the latter are no words amounting to a discharge or release. In this case the instrument is entire, & all its parts must be taken into consideration in giving it a construction. Thus if the lessee covenants with his lessor to pay him one hundred Dollars per annum rent, & the lessor covenants in the same instrument that the lessee may retain Fifty Dollars per annum for repairs. Now in such covenant the intention of the parties manifestly is, that the lessee is to pay the lessor the 50$ per annum rent. The Court will give the covenant such construction. 6 T. R. 737. 8 T. R. 483. 1 Ser. 152. Esp. Ni. Pri. 306.

Covenant.

There is a class of covenants which require distinct consideration viz.... Joint and Joint and Several covenants.

If two persons covenant "jointly & severally" the covenantee may maintain a distinct action against one, a separate action against either, or a joint action agt. both.

So also if three persons covenant "jointly & severally," the covenantee may have a distinct action vs. one, a separate action vs. either or a joint action vs. all of them. But an action agt. two without joining the third can't be maintained. The reason is the covenant must be treated as altogether, joint or altogether several. When therefore the covenantee brings his action vs. all he treats the covenant as altogether joint, when vs. one as altogether several; but when he brings his action vs. two & leaves out the third he treats it as partly joint & partly several, which the law will never allow. 4 Leo. 26. 1 Sid 238. 3 Ke. 782. 3 Bac. 698.

But if two or more persons covenant "jointly" to perform an act, they must all be joined in a suit upon the covenant; i.e. if the covenantors are all living at the time of the action brought. 2 Vern 99. 1 Salk. 393.

If there are two or more joint covenantees, they must all join in an action as plffs; otherwise the covenantor might be doubly charged. When one covenants to two jointly, there is no right in favor of either of the covenantees severally, the right is joint. The rule is that the person whose right has been violated shall have a remedy, but here the right is joint & the remedy must be joint of course. If the action is brot by one of the cov'ees alone, the def. upon oyer of the cov't. may demur. 3 Co 18. b. 2 Ke 282. 2 Ld Raym 1145.

When the right of the covenantees is joint, the rule is if one of them dies, the sole remedy is in the surviving covenantee. The representatives of the deceased cannot bring the action, neither can he join with the survivor. I am not here to be understood that the ultimate right of property in the obligation survives to the surviving obligee, but only that the remedy upon this obligation is now his this alone.— Cro E. 729. 1 Bos & Pul. 445. 1 East 497.—

In some cases, where one covenants with two or more jointly & severally, i.e. when the covenant is to the covenantees jointly & to each of them, the covenant is construed to be joint & in other several. That is, in some cases all must join in the suit notwithstanding the words of severalty, & in other cases each & every one may have a separate action upon the covenant. The rule is this; if upon inspection of the covenant it appears that the intention of the parties was to convey a several interest to the covenantees, each of them may have a several action; but if on the other hand it appears that the interest to be conveyed was intended to be joint they must all join in the action; the joint & several form of the phraseology notwithstanding. Here the interest conveyed is the criterion. Thus if one demises in the same instrument Blackacre to A. and Whiteacre to B. & covenants with both & each of them & to his interest in both those farms, yet the interest being several either may maintain a several action upon the covenant. Here the covenant as to Blackacre is to A & B. but B. has not the least interest in that farm, for it is demised absolutely to A. So also of Whiteacre A has nothing to do with it. & Co. 3. 18. 19. Yelv 177. 3 Bul. N. P. 158. 1 Saund 153. 2 Saund 116. a. n. 6.—

So also if one covenants with A & B. to pay them 100£. which sum is to be equally divided between them, this amounts to nothing more in its legal effect than a covenant to pay A. 50£ & B 50£ they will therefore have a separate action to recover so much. Cro E. 729. 1 Chitty on Pl. 5. And in this case each one may declare as if the covenant had been made to himself alone, & he need not state the other covenantee at all. Authorities above.

I have observed that if it appears upon the inspection of the covenant that the interest is several each of the covenantees may have a several action & if it appears that interest was to be joint the action must be brot by them jointly. Thus suppose A. demises Black acre to B & C. & covenants "with them & each of them". Here it is manifest the interest that the interest is joint, & both must join in the action, altho the phraseology is joint & several as to the covenantees. Here again the right is determined by the interest. 5 Co. 18. 1 Jenkins 262. 1 East 497. 1 Bac 532.

It follows then as an inference or corollary, that all the two or more coobligors may bind themselves severally to the performance of the same thing or duty, yet two or more coobligors cannot have distinct rights to enforce the performance of that thing or duty. For if two or more coobligors could have distinct & several rights of recovery, it would follow that the covenantor would be subjected to as many actions for the performance of one thing, as there were covenantees in the covenant. For a recovery by one in his own right is no bar to a recovery by another in his right.

Upon a joint & several covenant by two or more, all

may be sued alone for the neglect of the other, & altho the one sued is in no fault. As if A. and B. covenant that B shall perform a certain act; now here A. is nothing more than a surety for the performance of B. still he may be sued upon a breach of such covenant. Stra 553.

When two or more are jointly & severally bound, a recovery against one of the obligors is no bar to an action against the other. Neither is the taking the body of one in Execution a bar to an action against the other. But the recovery of actual satisfaction of one (as all the money due upon the covenant) is a good bar to any action brought v. the other covenantee. 6 Co. 46. Cro J. 73. 4 East 251. 5 Co. 86. –

If one of two joint covenantors dies, his Executor is not liable to the covenantee on the covenant. But if one of two joint & several covenantors dies, the covenantee has a right of action against the survivor & the Executor of the deceased. In the first case the covenant being joint, the deceased had no sole liability, he could not therefore transfer any to his Executor; but in the latter case the covenant being several, the covenantee had a right to have his remedy against the Testator alone; the liability will therefore survive agt. his representatives. 1 East 400.

If two or more covenant "jointly or severally" the word "or" is construed as having the same meaning as the word and; & such covenant is in effect the same as covenanting "jointly & severally". For here the covenantors put it into the election of the covenantee, whether he will subject them jointly or severally. Here they both covenant for each other, & each covenants for the other. Cowp 832. Rydon B. & Ey. 185. 186. Ja. 76 –

Covenants

If two covenant "jointly & severally," & one is made Executor to the covenantee, the whole obligation is discharged at law. Thus A & B are the covenantors to C. the covenantee, & A becomes Executor to C. Now if the action is to be brot. it must be brot by A. in his own name, & he is one of the obligors to the bond, so upon the record it will appear that A. is plff. & he might be made Deft. too. Here the right & duty unite. Salk. 300. 806. 135. 1 Inst 264 b.

The rule is the same in Chancery as between the original covenantors, & the covenantors representatives. Tho if in such case there is not assetts to pay the debts unless this covenant is paid Chancery will compel payment. Talbot cas. 240. 2 Vern 6. 264. 2 Bac 311. 9 Mod 62. 10 Mod 515.

In the last case a Bt. of Eq. will compel payt. of the bond in favor of the Creditors, upon the ground, that making one of the covenantors an Executor is in fact giving him a Legacy. It is in fact giving him a legacy of that bond, & legatees must be postponed to creditors according to the maxim that a man must be just before he is bountiful.

But the Executor in such case can never be compelled to pay the bond in favor of the testators representatives. His right is preferable to all mankind in law, & in Chancery to all except the honest creditor.-

When the instrument begins with "we covenant" & is signed by one only it is good as a sole or several obligation against him. 1 Burr 323. 2 T. R. 32.

If two or more bind themselves to either in an obligation, without using the word "joint", the obligation is joint of course unless words implying a several ob-

obligation or duty are understood. As if A. & B. execute a promissory note to C. without joint words expressed in it. This note will be construed to be joint. L. Ray 1203. 3 Bac 697. 1 Co. Bl. 236.

But if a covenant begins "I covenant", & is executed by two or more it is construed to be joint & several. This is a qulification to the last rule. Here the word. "I" in the singular is to be taken distributively. As if John Stiles promise to pay & "I" Tom Stokes promise to pay. Here such obligation is construed to be joint & several. Stra 76. 809. Peake R. 130. Chitty on B. of Ex. 175. L. Ray 1544.

Terms of Covenant written
October 2, 1844. 4th. Term
D. Tuttle

The Action of Account.

By Mr. Gould.
October 28. 1812.

It is unfortunate for this country that this action has been very much disused in the Courts of Westminster Hall in England. The common law action of account is a very common & frequent one in Connecticut, and says Mr. G. I believe in most of the States. In England on the other hand the action of Account has given way to a bill in Equity which according to their regulations is much more remedial. Indeed the last action of account brot in England, was continued from term to term in the Court of common pleas, evidently owing to the perplexities under which the Judges labour, & their entire ignorance of the whole science of this action, for the term of Fourteen Years! It is on this account that this action has not been matured & built up, as most of the common law actions have been. It is for this reason that the English Authorities are so entirely barren upon the subject. Comyn does not occupy seven pages in his digest in treating the whole subject, & many principles are still left unsettled, which it would seem ought to have been decided long since.

The action of Account is an action founded upon an express or implied contract, that one who has received the property of another to account for, will render an account,

account of it; & if he does not this action will lie agt. him.

At Common Law the action of Account could be maintained against three discriptions of persons only - viz. 1st Guardians in socage; 2nd. Bailiffs & 3rd Recievers - It did indeed lie between Joint merchants, but these were supposed to fall under the Clasp of recievers; and in the suit the Deft. altho a partner was treated as a reciever. - By this it is not to be supposed that Joint merchants were a distinct clasp but only a branch of the third clasp.

I have observed that the action lay only agt. three Clasps of persons. Guardian in socage was liable to the act in favor of his ward & bailiffs & recievers in favor of their respective principals. Com. Di. ti. acc. a. 1 Sel. N.P. 1. 2.

By the English Statute 4. Ann. the action is extended in favor of Joint tenants & Tenants in Common against their Co-tenants. In this case the Co-tenants, Defendants, are considered as Bailiffs to the pltff. Before the enaction of this Stat. it, if one joint tenant or tenant in common, recieved more than his proportion of the profits of the land, the Co-tenant could never call him to any account. 1 Inst. 172. a 1 Bac. 1.

At common Law this action lay only for or against the original parties themselves, & could not be maintained for or against their personal representatives. The reason of this was, that the action was founded upon a fiduciar privity of contract which was supposed to exist between the parties themselves, but which privity could in no way be transferred to their personal representatives. The consequence of this was, they were left at Common Law to account with each others disbursements & receipts. 1 Com. Ti. acc. D. 3d. 1 Just 89. 90. 1 Bac. 1.

There was an Exception at Common Law to the Last rule in favor of the personal representatives of Joint merchants but not against them. That is, the Executor of the deceased merchant, might bring an action of Account vs. the surviving merchant, but the surviving merchant could not sue the Executor of the deceased. Thus if A. & B. were joint merchants & A. died; now A's Exec. may sustain account vs the survivor viz B. - but B. could not maintain the action agt. the Executor. - (Quere, is it a good rule that will not work both ways? ?) - The reason why the Executor could not be sued was, he was not supposed to be able to render an account of the profits received by his Testator; but the survivor may as easily render an account to the Executor of the deceased as to the deceased himself were he living. - But this exception was introduced by the Law merchant & was supported only to favor trade & commerce. 1 Inst 90. b. Com Dig. tit. acc. b. -

The English Statutes 13. Edw. I. 25 Edw III and 31. Edw. III. extended the action generally to the representatives of Guardians, bailiffs, & receivers in their favor. That is, these Statutes gave the representatives of the party entitled, the same right of action, which before had been given to the representatives of a deceased joint merchant. But these Statutes gave no remedy against such persons. 1 Bac Ab. 1 Inst. 89. b.

And now by the Statute of Anne the action is given against the personal representatives of Guardians in Socage, bailiffs & receivers generally; & this Statute also extends the action in favor & against joint Tenants & tenants in Common. You observe there was no reciprocity, that the

Statute should have extended the remedy in favor of the representatives of the Guardians in socage bailiffs & receivers, for the Statutes of Edw. had done this before. Upon putting all these Statutes together, we find that the action of Account now lies generally for and against the personal representatives of the original parties. 3 Bl. C. 164. 1 Bac. 17.

In every case, except that of Guardian in socage, the Defendant is charged in the Declaration as bailiff, or as receiver or as both.

At common Law a joint tenant or a tenant in common was neither a bailiff nor a receiver, because he was liable to no action compelling him to account for the profits over & above his proportion; but the Stat. which gives the other tenant a remedy against & makes him liable to the action of account, ipso facto makes him a bailiff, or a receiver. He is not sued in the character of a joint tenant or a tenant in common, but in the character of a receiver or bailiff to the plff. So also in the case of a joint merchant he is charged as a receiver.

These Statutes have not multiplied the classes of persons liable to the action of account; but have only given a discription of persons within those classes, which at common Law were excluded. Thus the action will not lie now, unless it is brought against a guardian in socage, a bailiff or a receiver. The pleadings now are precisely the same as they were at common Law. Com. Dig. ti. acc. C. 2. a 3. Fitz. natura brev. 116.

When I observed that the joint tenant, or tenant

in common is not charged in that character, I did not mean that the plff. does not state in his Declaration that the Deft. is joint tenant or tenant in common, for this does appear, but I mean that the joint tenant &c is not declared against as nominee. He is charged as bailiff to the plff. In the writ, after declaring the Deft. as joint tenant, or tenant in common as the case may be, he is required to render an account of the profits he has received since he has become bailiff to the plff. or shew cause to the contrary. So also in the case of Joint merchants, the rule is the same. —

I have observed that the Deft. is always to charge as Guardian, bailiff or reciever. But note a material distinction betwixt a Bailiff & Reciver —

A bailiff is a servant or agent who has received property of another to improve for the owner, & who is intitled to wages for his trouble. 1 Inst. 172. a.

And a bailiff is bound to account not only for the profits he has actually made, but for those also, which by reasonable industry he might have made. Thus if A. furnishes B. with 1000ℓ worth of property to employ in traffic & speculation, & B. by his gross negligence suffers the property to lie idle, he shall be accountable for as much as the property might have gained upon a reasonable supposition. For this is manifestly a breach of trust. 1 Inst. 172. a. Com. Dig. tit. acc. a. 3. 1 Sel. N. P. 2. note. 1 Bac. 19.

A reciever is one, who has recieved money to the use of another, to render an account for it, but who receives no compensation for his trouble. He is not one, who receives property to speculate with & make profits out of

it for the owner. Thus if A Steward receives money of the tenants for rent; he is liable to an action of Account as reciver. Hovr. altho the Steward receives wages for his trouble in his office of Stewardship, yet he gets no compensation or wages upon the grounds of receiving the money to the use of the owner. Again I send A my agent to receive a debt for me due from B. A is my reciver, & he is liable to an action of Account if he does not pay it over. - 1 Inst. 172 a. 1 Rol. 114. Com Di. ti. acc. a. 4.

But to the general rule that reciver has no allowance & is not accountable for profits, there is an Exception in the case of Joint merchants. But this rule & exception is introduced by the lex mercatoria to favor commerce & for the benefit of trade. - 1 Com. Di. ti. acc. E. 10. 13. 1 Bac 19. 21. 1 Inst 172 a. -

It follows as a consequence from this distinction betwen a bailiff & a reciver, that a bailiff cant be charged in the declaration as a reciver. For if the bailiff is charged as a reciver & the plff prevails in the action, the judgment must follow the declaration, & the Deft. would be entitled to no allowance. - But in such case the Deft. will prevail upon the general issue pleaded; the evidence will not support the declaration. 1 Inst 172. a. 1 Rol ab. 114. 1 Bac. 19.

We have a Statute in Conn. extending the action in favor of and against joint tenants, tenants in Common, and Coparceners, & also in favor & agt. their personal representatives. So that an Executor here may be sued or may sue. You will observe that the Stat. of Conn has extended this action to a class of persons, who never had the right

of bringing the action in England. viz. Coparceners. These have now the same privileges in this State as joint tenants &c. - The Statute also extends the action in favor of one Executor &c. his Co Executor as residuary legatee, & against all residuary legatees generally. - Stat. Con. 28. -

It is remarkable says Gould, that our Stat. did not extend the remedy against the personal representatives of the bailiff & receiver, in terms. It is silent as to such persons. But our Courts, have, notwithstanding, uniformly sustained the action when brought against such representatives, upon the English Statutes. -

And on the other hand our Statute does not extend the action in favor of bailiffs & receivers; but our Courts have adopted the English principles in their full extent; so that when this action can be maintained in Eng. it will be supported in Connecticut.

I have before observed that this action is founded upon a peculiar privity existing between the parties. This action will not therefore lie to recover damages in case a Tort is committed; because here is no privity. Suppose, E.g. A. enters tortiously upon B's land & receives the profits. B. can't have this action to compel him to account for the profits he has received. He has another remedy however. -

There is an Exception to this rule, in Eng. in favor of the King. He may have this action. There is also another exception in favor of Infants. For if one enters upon the land of an infant wrongfully & takes the profits, the infant may have this action against him. But the wrong doer in such case is treated as the Guardian of the Infant. But this one

of the many privileges given Infants to protect them from the wrongs of the more mature in age. 1 Com. Dig. ti acc. let d. 11 Co 89 a. 2 Vern 295. 342. 1 Vern. 436. 1 Atk. 489. 1 Com. Dig. ti acc. a. 2. —

It is said in some of the books, that the action of account cannot be maintained, for the recovery of a sum certain. But in the unqualified terms in which it is laid I take the rule to be incorrect. The true rule I believe is that for a sum certain one cannot be charged as bailiff, but he may be as receiver. Thus if one delivers 100£ to A. to trade with for the benefit of the owner. now A. cant be sued for this 100£ alone, as bailiff; but he may be sued for the 100£ as receiver; or he may be sued for the 100£ together with the profits as bailiff. In such case the 100£ is not the exact sum he will recover, i.e. if A. is sued as bailiff; but he will recover in addition the profits he has made from the 100£. Com. Dig. ti acc. a. 3. 1 Bac. 19. 2 Bro. 76.

I am confident, says Gould. that this is all that is meant by the rule. For it is clear that if a Sheriff receives a sum of money upon an Execution, the plff. may sue him for that sum as receiver, in an action of account. Hob. 206. Again if I send my servant to receive a debt of 100£ for me, I can maintain this action against him, for that sum, as receiver.

'You may then set it down as a General rule, that when one receives money for another, & is to account for it. this action will lie against him to recover it out of his hands. 1 Inst. 172 a. 1 Bac 20. 1. 2 Mod 101. 1 Com. Dig. ti acc. a. 4.

If A receives money of B. to redeliver to him on the happening of a certain event. B may maintain this action against him as receiver. E.G. I deliver money to B. my agent to be redelivered

to me again unless he finds my creditor & pays it over to him. In such case, if he does not pay it over to the creditor I may have this action agt him. — Com. Di. ti acc. a. 4. 1 Roll 116. Fitz. natura brev. 116. 18. Finly 183.

If money has been received of A. to the use of B. this action will lie in favor of B. against the receiver. But he must state in his declaration of whom the money was received; because if he declares against the Deft. as a receiver generally, he will appear to be a receiver from B. himself. 1 Inst 172 a. 1 Roll. 120. Com. ti acc. a. 4.

But if I deliver money to A. to be delivered over to B. for my use, which money is actually delivered over, I can't maintain this action against B. Thus suppose I deliver money to a Merchant in Litchfield to be delivered over to a merchant in New-York for my use, I can't maintain account v. the N. York merchant; for there was no privity between us. But I may have another remedy as indebitatus assumpsit as the may be. Com. Di. ti. acc. D. 1 Roll. 118.

If Bailee of goods refuses or delays delivering them, the action of account will not lie against him. But trover, detinue &c will. Com. Di. ti acc. A. 1 Bac 19. 1 Roll. 116. — The reason why he can't be charged as bailiff is, that he does not receive the goods to improve for the bailor, & he can't be charged as receiver because the property is not money. A receiver is one who receives money to the use of another to account for. If the property bailed is money, he is not accountable as receiver unless there is some agreement between the parties which constitutes him a receiver.

This action does not lie v. a disseisor, because the action is founded upon a contract, & none is none; except in the case of the King & an infant, which I have before noticed. Com. Di. ti acc. lt. D. 3 Leon 24. — —

Action of Account.

If a Bailiff or reciver makes a Deputy [October 1812
A cant have the action of account against the [Lecture 2nd.
Deputy; for betwixt the Deputy & A there is not that priuil
ian privity upon which this action is founded. 1 Roll 118. Com acc. D.

The action of account will not lie, in any case, against
an Infant. For altho he is liable for his torts, and in some
cases for his contracts as for necessaries &c yet he can nev
er be subjected in this action. There is not only the general
objection that the infant is unable to contract, but he
is also supposed to want the necessary discretion to enable
him to render an account. 1 Roll 117. Inst 172. a. Com. Dig. ti. acc. D.

If he who reciues the property of another, to account,
makes an Express promise that he will account, the own
er may maintain this action against him, or he may
maintain assumpsit upon the Express promise. He may
have the account because there is a promise to account, &
he may have the action of assumpsit for the special dam-
age he has suffered in consequence of his breach of Express
promise to account.

It is said by Lord Coke that the plff. if he brings the
action of assumpsit, upon the Express promise, in the last
case, shall not be permitted to go into the particulars
of the account, but shall confine himself to the special
damage he has sustained in consequence of the failure
of the Deft. to render accounting. Salk 9. Carth. 89. Esp.
Di. 97. Finch 164. 354.

Now if the rule laid down by Lord Coke is true
it follows, that a recovery in the action of assumpsit
will be no bar to an action of account, because the two

actions will not be brought to recover the same thing. The action of Assumpsit, to recover Damages occasioned by the breach of promise & account to recover the value of the property deposited & the profits. This rule has been question-ed by the Editor of the last Edition of Bacon, in vol 1. P. 20.

But says Mr. P. the rule as laid down by Lord Holt, appears to me a reasonable one. I do not say it would be wholly impractable, but I conceive it would be attend-ed with extreme inconvenience, if the Plaintiff and Deft. in an action of Assumpsit were permitted to go particu-larly into accounting. But, says he, I can find no author-ities in the English Books to this point, which I attribute to the disuse into which this action has fallen there.

If one, by deed, acknowledges to have received prop-erty of another, to be accounted for, the party has his elect-ion to bring the action of account to recover it, or an act-ion upon the deed. The express or implied contract is not merged in the deed; neither is it given as a substitute for the other, but only for the purpose of furnishing an additional remedy. If the deed were given as a substi-tute, the principle that a man must resort to his high-er remedy would operate here; but this is not the case. 1 Roll. 118. Cro E. 644. 1 Pow. C. 219. 223. 425. 2 T R. 497.

If one finds the property of another, the action of account does not lie against the finder to recover it, up-on the ground that the privity which is necessary to sup-port this action is wanting here. The proper action in such case, after proof of ownership adduced, and a refusal to deliver, is Trover. Com. Dig. Ti acc. 2.

In the action of account, if the plff. prevails, there are always two Judgments. If the plff prevails upon the first issue, there are two, whether the final issue is in his favor or not. The first is a judgment, quod computet, i.e. that the Defe. account. The plff. does never recover his money upon the first issue; but upon the judgment quod computet Auditors are appointed by the Court to the Defe. accounts before them. 1 Wils 99. 1 Mod. 42. Com. Dig. Accounte. E. 15.

The Auditors being thus appointed, the parties are to meet before them, & the account is to be taken by them. The account being thus taken, the Auditors make their award or report to the Court; and upon this award or report final judgment is rendered. The award or report of the auditors, is much in the nature of a verdict by a Jury. If the award is in favor of the plaintiff the Judgment of the Court is that he recover the sum thus found due to him by the arbitrators with all his costs. 3. Bl. C. 164. 11 Co. 40a. 1 Sel. N. P. 7. 8. 9.

Under the Statute of Conn. the parties have a common right to testify, for themselves, before the Auditors; and each one may be compelled by the other to disclose; and on being thus required, if he refuses he may be imprisoned by the Auditors 'till he will testify & answer. Stat. Conn. 28.

If the Defe. refuses to appear before the Auditors, or if upon his appearing he refuses to produce his account to the Auditors, the auditors must award, that they find the whole sum claimed by the plff. to be due. In Eng. by the common law this is done by the Court. Cro. E. 806. 3. Wils 357 Com. Dig. Accounte. E. 15.

By our Statute it is provided that if the Auditors find a balance in favor of the Defe. they must award that

ballance, which on being returned to the Court, the Pff. will recover the amount the arbitrators have found due him, and his costs. Here in this stage of the proceedings the Pff. is allowed to become a Defendt. But in a Court of Law in England this can never be the case. If the arbitrators do award a ballance due the Defdt. he there can recover no more than his costs; but upon a bill of Equity, which you recollect has superseded this action in Eng. Chancery will decree in whose favor they find a ballance. 1 Bac. 15. 2 Swift. 150.

I would now observe that these proceedings of the Arbitrators are not before the Court, or under their controul. They may out of Court, at a time & place by them appointed; i.e. unless the Court appoint; this is seldom done.

Pleadings. As to what pleas the Defdt. may plead in bar there are contradictions in the books. These arise I apprehend from the barrenness of the authorities upon the subject, & the total disuse of the action in Westminster Hall. There are however some rules which appear well established.

It is a general rule, that it is competent, for the Defdt. to plead in the action, any matter to shew that he was not bound to account. The plea in bar must be made before the Court, & before the rendering of the first judgment. The general issue is, never Guardian, never bailiff or never receiver, as the case may be, & these are all good pleas; & if proved will bar the action. Com. Dig. Accompt. E. 4. 1 Rolle. 121. 1 Bac. 20.

So also "a release of all actions" is a good plea in bar. For if the plff. has released to the Defendt. his right to recover in all actions; it will operate as a discharge to this as well as all others. 1 Rolle. 123. 4 Bac. 85.

It is

It is also compulent for the Defe. to plead an award of arbitration" that he should be acquitted of the action". For if the parties have once submitted to arbitrators, & they have awarded in favor of the Defend. it is an extinguishment of the Plff's right to recover. For there is always an implied, if not an Express contract, that the parties will abide the judgment of those men, who they have selected to settle their disputes. Such a fact is therefore a good plea in bar to the plff's right. 6 ro 6. 82. 4 Bac. 85.

It has also been determined that a plea, that Defe. received the money to deliver over to a Stranger, & that he did actually deliver it over, is a good bar to the action. For if the Defe. received the money to deliver over to J. S. he never was liable to account. Com. acc. E. 5. 1 Roll. 122. 26. 6 ro E. 3 303 Wils 114. 15.)

The pleas which I have thus far considered, all conduce to shew that the Defe. is not liable to account. You may ask, why is the Defe. confined to pleas in bar, which go to this point only? It is because all pleas in bar, if true, prove that the Defend. ought not to account; and it is a general rule that any plea in bar, which does not shew this, is ill. Thus if the Defe. pleads payment in bar, it is ill. For this admits the fact that he was once liable to account. Payment is not accounting; & altho he may have paid the plff all his due, still the plff has a right to his account. 6 Co 7. 4 Bac. 85.

But a plea that the Defe. "has once fully accounted", is a good plea in bar. For if he has once accounted fully, it will be idle to send him before auditors & compel him to account the second time. Such plea is good then, altho by it the Defe. admits that he was once liable to account. If the Defend.

has once rendered his full account, this is not the proper writ to recover the ballance due; it is indebitatus assumpsit, or on an insimul computs. which must be brot. 3 Wils. 114. Com. Dig. Action on C. 3.

But upon the plea of "full account" the defend. cant go into the particulars of the account, as the items which compose it &c. For if he were allowed to do this, he would be, in fact, accounting before the Court, and they have no jurisdiction over such matter. But he must prove the accounting some other way; as by a writing signed by himself & the plaintiff, with the account stated & so this upon. 1 Rool. 425.

It is a general rule that if the Defr. once admits his liability to account, that no special plea in bar is good, except the plea of full account or release, or something equivalent thereto, as an award. All other defences he is not allowed to use before the Auditors. 3 Wils. 73. 113. 114.

All defences, except such as go to shew that he was never accountable, must be pleaded specially. Of course a full accounting, and a release must be specially pleaded, because such pleas are inconsistent with the general issue, which you recollect is, never Guardian, never bailiff never receiver. They therefore cant be given in evidence under it. They do not deny that the Defr. was once liable to account but on the contrary admit the fact; but they have been released by matter subsequent. (3 Wils 113. 14. 2 Swift 149. 50.)

After judgment quod computet & before the Auditors, the parties may plead & join issue either on matter of law or fact. It is said that when issue is joined before the Auditors, the cause must be carried back to the Court & by them tried.

But by this is only meant. then when the issue is joined upon some special matter of law or fact. The most usual plea of the Deft. before the Auditors is "nothing in arrear", & they are bound to determine, when this is the issue. But it is true, if the issue is joined upon a matter of law, it must go back to the Court, for the arbitrators are not competent to determine a demurrer. 3 Wils 99. 157. Cro c. 84. 806. Com Dig. tit. acc. D. 4 E. 11.

The above rule, so far as it relates to a special issue in fact is not adopted in Conn. Here any issue or fact is tried by them.

Another general rule is, that whatever can be pleaded in bar must be so pleaded, & cant be pleaded in the trial before the Auditors. The rule is general, that whatever is properly pleadable before the Auditors cant be pleaded in bar: so also whatever is properly pleadable in bar, cant be pleaded before the Auditors. For to any given Defence the Deft. must plead thereto the earliest opportunity he has. It would be contrary to all rules therefore if the Deft. could retain his plea in bar to be made use of before the Auditors when it would have been effectual to have prevented the first judgment. If therefore he does not make use of his plea in bar before the Court, at the proper time, he shall be considered as waiving that defence, and resting it upon some other matter. Dyer. 82. 116. 3 Wils 3. 101. 113. Com. 219.

It is a general rule that the Deft. can never plead any matter before the Auditors, contrary to what has been pleaded & found in Court. This would be, were it permitted to contradict the first judgment quo computat. Hence the Deft. can never plead before the Auditors, that he was never bailiff or receiver &c. For the judgment quo computat

necessarily implies that he was. Neither can he plead a release, for this would have been good plea in bar to the action. Neither can he plead before the Auditors "that he has fully accounted," or that he has been discharged by "an award of arbitrators that he should be discharged;" for these are defences which he should have used before the Court, & the judgment quod computet, implies a negative of all those facts or defences. The arbitrators can therefore have no jurisdiction over them. Bro C. 82. 3 Wils 113. 2 Day 116.

Contra it is good accounting before the Auditors, for the Deft. to shew any thing, which he could not plead in bar, before the Court, to the action, but which proves he ought not to be eventually liable. The rule presupposes that the defence is such as could not be pleaded in bar; he must be allowed to make use of it before the auditors then, else he could not shew it any where, and it would be a reproach to the Law that a man has a defence & is not permitted to make use of it. Suppose for example the defence is, that the property for which he was accountable was lost at sea by the act of God. This defence could not be pleaded in bar but it is good pleading before the Auditors. It admits his liability to account, but discharges him from all eventual liability to pay for the property. The rule is the same if the property was lost by public enemies, by robbery &c without fault of the Deft. 1 Inst 89. a. b. 1 Rolle 124. com. di. tit acc. E. 11.

The proper mode when the Deft. pleads any of these things is to make out the account charging himself with the property, & then charging the plff with loss by the perils of the sea, public Enemies, by robbery &c as the case may be.

If the whole of the property was thus lost, the Defe. may charge him for the whole; if but a part he may charge him pro tanto. Com. Di. acc. E. 11. 12. 4 Co. 84 a. 1 Inst. 89.

But a plea that the property was perishable, and being likely to perish, the Defend. sold the same upon a credit, is not good; unless he had special permission or authority from the Plff. to sell. 2 Mod. 100. 1 Bac. 21. Com. Di. ti. acc. E. 12.

A Bailiff is allowed all reasonable charges and expenses in his account; the bailiff must have a compensation, else he loses his character as bailiff. This rule does not hold where a man makes himself a bailiff in his wrong. E.g. in case a man enters wrongfully upon an infants Estate; he is liable to the infant for all the profits he has actually made from the land & also, for all he might have made; still he is not entitled to the benefit of a lawful bailiff & can recieve not the least compensation. 1 Inst. 89. Com. Di. ti. acc. E. 12. 13. 1 Leon. 219.

And a reciever is entitled to no allowance whatever; for, he is one, who has the money of another to account for, without using any trouble or expense about it; and if he does use any trouble or expense about it, & recieves a compensation therefor, this at once destroys his character as reciever, & makes him, ipso facto, a bailiff. 1 Inst. 172 a. Com. Di. ti acc. E. 13.

The following are rules which have been established under our Statute.

In Conn. when an action of account is brought before a single Magistrate, as a Justice of the peace, he must hear the issues; that is he determines in the first place whether the Defe. shall be compelled or not to account, and if so, he then adjusts the account, himself stepping into the place of a Auditors. Stat. Conn. 282. ti. ji. 51.

Action of Account

It is also provided by our Statute, that in an action of Book Debt, where the sum exceeds 17$, the Superior Court, or Court of Common Pleas may appoint Auditors to adjust the accounts of the parties & proceed in the same manner as in an action of Account. This is very convenient, for the action of Book, nearly resembles that of account.

It is further provided, that when judgment is rendered by a Court of common pleas upon an award of Auditors, there can be no appeal to the Superior Court, whatever be the amount of the demand. In Eng. in the action of account the plaintiff is not entitled to a discovery of the defendants books, or papers, nor can he compel him to testify, in order to discover the truth. But in Chancery he is entitled to use these different sources to obtain information; it is for this reason as I have more than once observed, that a bill in Equity is now universally resorted to in England. 3 Bl. C. 437, 3 Bl. 182. Wat. on Partnership 223. 1 Bac. 16.

On the other hand the Stat. of Conn. has given the auditors virtually all the powers of an English Ct. of Chancery.

I have observed before that either party may compel the other to testify and may have access to all the others papers & books relating to the subject; upon perusing these that our action of Account is as extensively conducted as it is in Equity in England.

There is however a class of cases where the action of account will not lie in Conn. that is, where an account between three or more partners is to be adjusted the action will not lie. This point was decided by our Sup. Court in the case of Boardman & Seymour, at two or three years since.

The reason is, that it is impossible for the Court to adjust the accounts of all the partners. Suppose e.g. A. B. C. & D. are partners. A brings an action ag. B. C. & D. and recovers: after this B. is intitled to his action ag. C. & D. & if he recovers C. may have his action ag. D. But suppose e.g. in that A brings his action ag. B. only; recovers from him, i.e. their accounts are adjusted, it may be necessary for A to bring his action ag. C. & D. for an adjustment of their accounts; & then B. C. & D. are intitled to their respective actions ag. each other. It is on the account of the multiplicity of the actions which might otherwise be maintained, that our Courts have decided they will not adjust the account of more than two partners. They are therefore now compelled to apply to Chy for an adjustment.

If either of the parties are dissatisfied with the award of the Arbitrators he may apply for relief to the Court. This is the rule in Eng. as well as here. 1 Bac. 21. But for what precise object the Court will set aside an award of Arbitrators does not appear to be well settled. Some reasons however are well settled to be sufficient. As if the auditors exceed their commission; if they have made a mistake in their own principles, e.g. if they settle what claims shall be allowed & what disallowed, & they make an arithmetical mistake in computation; if they make a mistake in gross facts; or if there has been any corruption or partiality used by them; for any of these reasons it is clear their awards will be set aside. 1 Root 268. 2 Dall 13. 2 Day 115.

The mode of objecting to an award is by a written remonstrance to the Court. The Ct however will not generally make an enquiry into the facts at large. If however the cause appears upon the face of the award, or if they can be learnt from the Auditors themselves in Court, the report may be set aside. When the objection is on the ground of misbehaviour in the Auditors it must be proved as any other fact, as by evidence to that purpose must be given. Kirby 353. 1 Conn 137. 261. 2 Day 116.

Ellis.

The Action of Debt.

By Mr Gould.

The legal acceptation of the word "Debt" is a "sum of money due by certain (or express) Contract." E.g. By a Bond to a determinate sum, note, special bargain &c (posta) 3 BC. 154. Cap. Pl. 172.

So for a sum capable of being ascertained. Doug. 6.

This is generally so 1 Tr. 132. 550.

The action of Debt lies in some cases on Contracts implied (as posta): but not it is said on Contracts implied to pay an uncertain sum. E.g. If A sells goods and agrees by parol for a fixed price, the action of debt lies. But if no price is fixed, debt lies not. 2 Bac. 13. 4 Co. 94 a.b. 3 BC. 155.

See 1 Tr. 132. 550. that it does not lie.

The action of debt has been discussed in Eng. by reason

I.st ... Of the wager of Law. 3 BC. 155. Chitty 219. To find what wager of Law is see Co Litt. 155. 3 BC. 341 to. It is the Defendants swearing that he owes nothing and his Compurgators swearing they believe him. Wager of Law is equivalent to a Verdict for the Defendt. 3 BC. 343.

II.dly Because the whole sum demanded could not be recovered, if any, according to the old rule. 3 BC. 155. Dyer 219. 2 Roll 106. This rule is not now observed. See 2 BC. Rep. 1221. Doug. 6. 702. n. 1 Tr. 132. 247. 550. It was said that this action of debt on simple Contract has long been discussed in Eng. it however has lately been revived. i.e. Debt on simple Contract. Chitty on Bills 219.

Action of Debt.

In some cases debt lies not, on express simple Contracts. E.g. it does not lie vs. executor or Admr. - There is no indebtedness on his part. Plow. 182. 1 Saund 200. Chit. 18. 219.

For the Testator might have waged his Law. but the Exor. or Admor. cannot. Esp. Di. 172. 9 Co 87. Cro C. 135. 187.

Debt lies on a Promissory note. Chitty 221. 10 Mod 38. (Whether it will lie in favor of the indorsee vs. the indorsor is doubtful. Chitty 221. 1 Mod Ent. 312. Stra 880. 8 Mod 373. Boyf. 94. n. c. Esp D. 173. It seems to be in the nature of an assumpsit. Esp D. 173.

In action of debt will not universally lie on Express Contracts. The rule is this - If one expressly promises to pay a sum certain for property delivered to his own use, or for services rendered to himself debt lies. Seems generally if he promises for another, or for services rendered to another, debt lies not. Case of the Attorney. Esp. 173. where a promise was made by A. to pay an Atty. if he acted for B. debt will not lie. - Promise or lein, relinquished by the plff. - promise to pay another debt - in such case debt lies. 3 Burr. 1886. Chit 18. 220. Dyer 21a. Cro E. 880. 2 Bac 20.

Hale. the rule to be this" or those promises which under the Stat" frauds and perjuries" are called collateral debts at Common Law will not lie, tho' by action of Assumpsit will. But or those promises which under the Stat. are called original debts will lie.")

Here there must be a special action on the case. Cro C. 107. 140. 193. Esp Di. 173. Debt will lie where the person for whose use &c is sworn liable. 2 Ray. 842.

So debt lies not for [illegible] vs the acceptor of a Bill of Exchange. He is rather in the nature of a Surety, or

guarantee, and is therefore a collateral promise. The Drawer is the Debtor & liable in Debt. 2 Lev. Chitty 220. Esp. Dig. 173. Salk 23. Chit. 13. 220. 1 Roll. 597. Dyer 21. 21. 12 Mod. 152. 12 Mod 345.

The rule of Com. Law was that the plff in debt must recover the precise sum declared for or nothing. F. N. B. 119. Dyer 214. 3 BC. 155. This rule is not now observed in case of debt on simple contract. See 2 BC. Rep. 1221. case of a motion for a New trial. Doug. 6. 763. 704 N. 176. BC. 249. 255.

Debt lies in some cases on implied contracts, e.g. vs a Sheriff who has collected my money. Hob. 96. 2 Bac. 14. Chit. B. 220.

And sometimes where there is nothing like a bargain or contract or other commercial transaction, from which to imply a contract. E.g. on a Penal Stat. where the penalty is certain, there being no specific mode of recovering the penalty prescribed. 2 Bac. 14. 1 Wms 578. This is a common practice in England, and here (Conn.) it is a civil action. 4 T. R. 756. 7 D. 257. 2 Ld. 203. Comp. 382. 3 J. R. 448. Kirb. 179.

There has been some difference of opinion with regard to the plea in an action of debt to recover the penalty in the above case. "Nil debet" is a good plea, but whether "Not Guilty" is a good plea has been questioned. It seems that Not guilty is a good plea on the idea, that the action tho in form an action on Contract, yet in fact arises by statute, and a plea of not guilty proves nil debet by inference only. Carth 381. 1 T. R. 462. So an action of debt founded on Specialty "not guilty" is not a good plea. Ld. Ray. 1562.

Tho' debt lies not to recover damages, yet after damages are recov. debt lies on the judg. Tho the damages by the judg. be made certain. 2 Bac. 14. 1 Roll. 600. 601. 2 Bl. 465. Hob. 206.

Action of Debt.

So the action of debt will lie upon the award of Arbitrators to pay a sum certain. It is in nature of a Judgment. 2 Vern 423.

After the Defend. in a judgment is in custody an the Exec^{on} debt on judgment lies not vs. him. Esp. Ni. 196. 4 Burr. 2482. 1 T. R. 557. 6 Mo. 525. 7 Mo. 420. - So if having been in custody he is discharged with pl^{ff}'s consent. Taking in Execution is a satisfaction in Law. 3 Wils 13. 7 T. R. 431. 4 Burr 2482.

So if goods to the amount of the Exec^{on} are taken, debt on the judg^{t} lies not vs. him. Salk 323. 2 Ld Raym 214. 2 Bac 355. 1 Rol. 551.

But it lies if only a part of the amount has been levied. Esp. Ni 196. 1 Burr 92. -

As to the proper time for bring^{g} debt on judg^{t} in Eng. & Comth.

In Eng. it is a general rule that an Execution cannot issue after a year and a day from the time of rendering judgment, and in this case the pl^{ff}'s only remedy at Com. Law was by an action of debt on the judgment by original writ. The reason was that after that time judgment was presumed. 2 Bac 361. 2. Carth 30. 1 Salk 321.

But the Stat. of Westm^{r} 2^{d}. gave the pl^{ff} a right to sci. fa. calling on the Defend. to shew cause why Exec^{n} should not issue, and now after a year & a day the pl^{ff} cannot take Exec^{n} without a sci. fa. There is an exception to this rule when Exec^{n} has been suspended by a writ of Error, some other cases. So debt can be maintained without scire facias after the expiration of a year & day. 2 Bac 361. Com Dig 364. 1 Ld Raym 849. 6 Mod 283. Carth 283. 4. -

It has been questioned in Eng. whether debt on judg^{t} will not lie within a year & a day. 1 Mod. 101 & 2. 1 Lev

Action of Debt.

after a year &c. — Dy. 17. 16. 637. — It is said in 2 Roll. Ab. 14. that debt on judgment is allowed to punish the Defend. for not paying &c. that plff may not be put to the expence of levying by Fier. to compel payment without Execution — therefore that the action will lie, before a year & a day. In Com. Rep. before judgment in Hilary term, and debt on that judgment at ye next Easter term, i.e. ye next term — within a year &c. —

In Com. no time is limited for taking out Execution, therefore there is no necessity from Lapse of time to bring debt on judg.t after a year &c as in Eng. And it seems to be generally agreed that in Const.t debt on judg.t will not lie, while Exn. can be taken out for full benefit of ye judg.t obtained by it. Here it would be vexatious to sue. —

But on the other hand where Exn. cannot be taken out, Debt on judgment will lie. E.g. if a Justice before whom the original judgment is rendered dies or be out of office before Execution granted or Satisfaction of Judgment, ye plff may have his action of debt on judgment within five years. if the debt does not exceed 35$ it may be before another Justice. If it exceeds $35 it must be before ye County Court. Stat. 38.

So where great length of time having elapsed, the Court will not grant Exn. — Debt on Judgment or scire facias will lie.

So where full benefit of the Judgment cannot be obtained by taking Execution an action of debt will lie. — As if the Defend. in the original action is an absconding debtor & plff. wishes to sequestrate. In this case the property cannot be taken on an execution in the hands of his agent or trustee, and Debt on the Judgment lies. Hardy 111. 421.

Action of Debt.

So if judgment was rendered in another State, where satisfaction cannot be obtained and Defdt. has removed to this State, debt on the judgment will lie. Kirby 173.

So where the Pltff. wishes to obtain interest on his judgment, it seems debt will lie. (Our courts having of late allowed interest on liquidated demands according to the Com. Law. Formerly our Cts. allowed no interest in such cases.) Late case in Middlesex County. - Decided in favor of the action: (Related by Judge Kane).

It is no objection to an action of Debt on judgment that the judgt. on which the action is founded is erroneous. An erroneous judgt. will support this action, for such a judgt. is available to all purposes till reversed. 2 Bac. Abr. 711. 1 T.R. 458. 3 Wils. 345. 8 Co. 42. 1 Ld. Raym. 176.

The Constitution of the United States "Full faith & credit shall be given in each State to the public acts, records & judicial proceedings of every other State." The Question has been made whether the validity of a judgment rendered in another State, can be gone into in this - in other words - Whether, when a judgment is rendered in another State, there can be no enquiry in this State, into the original cause of action? (Some have supposed that the Constitution extends to, or means only this - That the records of other States shall be received as full evidence that such proceedings have been had, and are prima facie evidence of their validity, but not conclusive proof of it. But on this construction the Constitution has effected nothing more than existed before, under the Common Law. Mr Gould thinks that the record of a judgment in another State is conclusive proof of

the demand. It is a mere rule of Evidence.) It has been decided in Sup. Ct. in New York that there may be an enquiry into the original cause of action. Contra in Connt. So in Penn.a. 1 Dall. 219. 2 Yeates 302. 1 Yeates 261. Caines 460. 1 Dall. 188. Kirb. 136.

According to the above decision they are placed on the same footing as foreign judgments. They are not records according to the Com. Law, and are only prima facie evidence of a legal demand. It was formerly ruled that debt wd. not lie on a foreign judgment. Stra. 1090.

It is now settled that debt will lie on foreign judgments, but they are treated as simple contracts only. The merits of the demand are examinable: and evidence arising from such a record may be rebutted. The judgment itself however, implies a sufficient consideration till the contrary is shewn by the Defendt. 2 W. Bl. 410. Doug. 1.

The Plff. in declaring, i.e. in an action on a foreign judgment, need not shew the original cause of action. It lies on the Defendt. to shew that the claim would not support the judgment. Doug. 1.

The judgment of a foreign Court is examinable here only, when he who claims the benefit of it, applies to have it enforced. For it is then voluntarily submitted to the jurisdiction of our Cts. Accus when pleaded in bar. — 2 W. Bl. 410. 1 Shower 232. 1 Ray. 473 Skinner 59.

To debt on such a judgment nul tiel record is a good plea. For declaring on a judgment as recd. does not vitiate the declar. "prout patet per record" is surplusage. Doug 6.

The laws of foreign Countries are provable as matters of fact in such cases. Ethe Bulst. Court 174. 5. 6 Mod 195. 2 W. Bl. 410. 3 East 221.

Action of Debt.

Before the adoption of the present constitution the Cts. in Virg. allowed debt on judgments rendered in other States, & held that full credence was to be given &c but they held that the original cause of action must appear in the decl. Hay. 126.

They treated such judgments thus far as less sacred than foreign judgments at Com. Law. Doug. 1. shewing the original cause of action was not necessary on principle. "no judgment alone is a sufficient consideration" (see last page.

Indebitatus assumpsit is concurrent with debt on foreign judgments. Doug. 4. 5. b. Interest is allowed on such judgments, as well as on a judgt. rendered here. 1 East 436.

It has been said (Doug 6) that when indeb. assp. lies debt will also lie. It is not so in all cases. E.g. money paid by mistake ... obtained by fraud ... by breach of trust, - by sale of property converted by a person not the owner. 2 Burr. 1008.

The rule is to be understood in general, of concurrent, of express promises to pay money, and of those implied from an actual contract. E.g. Sale of Goods without an express promise. Service rendered without an express promise. 1 T.R. 550. (see ante 1 page of this title at ye top.)

On a void judg.t debt lies not. E.g. on judg.t obtained by fraud. By action lies, i.e. fraud in the proceedings. It is a nullity. (Vin. abr. title "Vacat". For instance, if the service is forged by the Sh.ff, the Defe. having never had notice. & one personally another confesses judgment in his name. (& if irregularly obtained - The Question arises, what is irregularity?) Non payment of duty in this State ... Process in garnishment follows usage in Eng. 3 Wils. 341. 2 Bl. R. 845. 1 Str. 509. 2 Wils 47. Str. 999. Proof not attainable on a writ of Error. 6 Mod. 514.

Not returnable to next Court. So want of jurisdiction over the subject matter. - See "False Imprisonment."

In Com. on judgt obtained by foreign attachment debt it is said lies not w.th absconding debtor himself, the object being to draw property out of th. hands of the Garnishee. (Bac.) But debt on a common judgment may be brought by foreign attachment, stating that satisfaction of the judgt cannot be obtained by Execution. Tidby 311. 421.

For money secured by a Bond or Single Bill or recognizance, the action of debt is the only com. law remedy. The most proper action on our Due-bills, given for money. So it lies on a recognizance - sometimes a scire facias. Esp Dc. 193. 2 Bac 13. Cro C. 494. 187. 608.

A Bond if payable generally, i.e. no time of paymt being fixed, is payable on the day of the date. 7 T. R. 124. When the condition of it was, that the bond be void if the Defendt did not pay, C.B. held non payment a breach - it was a clear mistake. Doug. 369.

If a bond is given conditioned for the performance of a collateral act, there is sometimes a remedy in Chy. (which will decree a specific performance) (of which post.) under the proper title) it being viewed as evidence of an agreement to do the act. But the Com. Law remedy is the action of debt for the penalty.

In debt on Bond damages may be given exceeding the penalty, in certain cases, eg. if principal and interest surmount the penalty. 2 T. R. 388. Doug. 49. 1 Burr 320. 322 n. 328. - 2 Bl. 432. Pow. Mort. 146. 1 Burr. 232. 2 Saund 69. 6 T. R 308. 1 Ca. 436. Cont. 1 Atk 70. 3 Bro. Chy. 489. 496. Cont 2 Bl. R. 1190. 3 East 604. -

Action of Debt.

Or Covenant to pay a sum certain debt lies, vt. ante title "Covenant." Stra. 1089. 1 Roll. 591.

If the condition of a bond is that the obligor render a fair & just account of monies received "non performance of the sums received is a breach. Doug. 367. 2 Cr. R. 388.

If there is a covenant with a penalty, the obligee has his election to sue for damages in Covenant broken or in debt for the penalty, unless it appears that the covenantor was to have his election to do the act, or pay the penalty. In such a case on non performance of the act, the action of debt (supposed) lies for the penalty only. 2 Bac. 6. 136. 3 Bur. 1345. 2 Atk 371. Stra. 533. 2 P. Wms. 192. 2 Lev. 528. 1 Bro. C. C. 418.

Debt lies vs. an officer who has collection money for a pltf. in Exct. on refusal or neglect to pay it over, for carrying it implies a contract in Law. By the Civ. Law, the indebitatus assp is considered as transferred to the Pltff. 2 Bac. 14. Hob. 206. Moore 886. Chitty 220. 2 Vc. Br. 550.

It lies for rent reserved in a Lease - it is the usual appropriate action (tho' in some cases Covenant is concurrent). Esp. Di. 188. Co. Litt. § 58. 72.

It does not lie vs. Tenant at sufferance, for rent in arrear, by the Com. Law. He is a wrong doer, for the contract was determined. Esp. Di. 188.

But Debt will not lie for collateral articles, devised & not sold for want of purchasers. Debt being a sum of money due. 2 Bac 14. Hob. 206. Bro. A. 514.

But if he should return collateral articles taken and estimated them in his return at a sum sufficient to pay the debt &c. and should neglect to sell

them, it would seem that debt lies vs. him. For his own return should that the Defend. in Execution ought to be exonerated. 1 Rob. 206. 8ed Qu.

In Debt on parol contracts the Stat. of Limitations, or a release may be given in Evidence under "nil debet". (the gen.l issue). Salk. 278. 3 Bac. 518. 2 Ray. 866. Cas. Pr. 262.

The Stat. in Car. Limiting actions vs. Sheriffs. for, neglect or default to two years, extends not to actions to recover from him, what he has received in Exec.n. This is not a neglect or default within the Stat. Stat. Car.s 460.

The Action of
Detinue.

The action of Detinue lies for a recovery of a specific chattel, and thus far it is in the nature of a bill in Chancery, as to its effect. It is brought to recover the object of the suit specifically. Eg. The judgment is not to recover the value of the chattel as in Trover, but the chattel itself, with a clause inserted that if the chattel can't be specifically restored, the Defendt is to pay the value of the same & damages for its detention; & the officer who has the execution is to collect the same in cash, unless he can get it & the identical chattel. 1 Inst. 286. 3 Bl. C. 152. Cro. J. 561. 2. Bac. 45.

But as this action is brot for specific restitution, it will not lie for the recovery of any personal property which cant be identified, or which will not admit of such description that it may be distinguished in the judgment from property of the same kind. Hence it will not lie for the recovery of money or coin; because it would be impossible to describe such property so as to distinguish it from that of the same kind. 1 Roll. 606. Com. Dig. A. det. B. 2 Bac 46.

But altho this action will not for an aggregate sum of money as 20£ still it may be brought for a piece of gold of a given value, for this may be identified. It will also lie for a sum of money contained in a box or bag, for by this means it may be described. Com. Dig. dt. B. Cro C. 4.

This action lies only in those cases, in which the Plf

obtained possession of the property (unjustly, as by delivery to be finding). The reason why Detinue will not lie for the recovery of property, the possession of which has been wrongfully obtained is that the action is founded upon a contract.

I observe that Judge Swift says Detinue sounds in tort, but this is not true. Since it is that Debt & Detinue may be joined in one & the same declaration; but contract & tort can in no supposable case be joined in the same declaration. Com. Dig. Pl. Ti. 19 Ct. B. 1 Roll 606. 3 Rum & Eng. L. 67. 4 Bac Ab. 1 Bac 28. 2 Burr 1126. 2 Saund 200.

Indeed the action of Detinue is, in its general nature, the same as an action of Debt. It is an action of Debt for the recovery of a chattel; and the action of debt is nothing more than an action of Detinue to recover money. Debt lies ag. him, who detains my money, & Detinue ag. him who detains my chattel. 3 Bl. C. 154.

The action of Detinue will not lie to recover money Cent. for in this kind of bailment the specific article or coin is not to be restored, but only its value. 2 Bac Ab 1 Roll 606.

The action of trover has now become concurrent with the action of Detinue. Trover will lie in all cases in which Detinue will; but not e converso. Where the gist of the action is the unlawful detaining there detinue will lie; but where it is for the unlawful taking or the unlawful using there Detinue will not lie.

The action of Detinue has gone almost entirely out of use; in fact it was never in use in this country. It has been disused in Eng. first because in this action the defend. had a right to wage his law, & second, on account of the difficulty attending the certainty requisite in describing the chattel demanded. Trover is therefore much more convenient,

for in this action there are neither of these inconveniences.

But, by the way, Trover is an action unknown to the common Law. It first originated from the very Liberal construction given to the Statute 13. Edw. I. Neither was the action of Trespass on the case known, eo nomine, to the common Law, but it derived its origin from the same Statute. Since that time these two actions have by degrees undermined the action of Detinue & driven it from the courts of Westminster Hall. 3 Co. 87 a. Cro. J. 204. Yelv. 178 2 Bac 45.

Forms of the Action of Detinue.

Actions on Contracts.

Of Notice & Request. By S. Toulmin Esqre.

At Common Law a request by the Pltff in actions on Contract is always necessary. But in many cases it may be by Suit only. 5 Com. Dig. 194. 6 Jb. 227. Cro C. 797. 12 Mod 392. 1 Ld Ray 133. 10 Mod 38. 3 Salk 308. Com. Dig. "Plead" 2 C.

The Pltff must always aver notice to Defend. when action lies not without notice: as where it is expressly made necessary by the terms of the Contract. So when the fact on which the demand arises is (as between the parties) confined to the Pltff's knowledge. Eg. A promises to pay B at such a rate, as any other person should pay the Pltff for the same. Seems if to pay as much as A. S. should. Bro. Abr. Notice 51. Com. Dig. "Condition" E. 8. Cro J. 432. 1 Rau. 463. 2 Str. 1142. First mode in this section denied. Semble Kirby 188.

So of a promise to pay on the day of the promisor's full age, he must aver notice to Defend. Sc. Com. Dig. "Notice" B. "Condition" E. 8. Salk 158. Cro J. 57.

Seems if a promise to pay on the promisor's marriage with a certain person as A. B. the promisor takes notice at his peril. Com. Dig. "Plead" C. 76.

So on promise to deliver so much corn if the Pltff approve it, the Pltff must aver that he gave notice to Deft. that he approved it. 4 Ld Ray 1480. 3 Salk 158. Com. 53. Cro J. 49. 51.

So on Contract to account before arbitrators when the obligee shall assign: the Pltff must aver notice to the Deft. 1 Rol. 462. l. 50 Com. Dig. "Pleader" C. 73.

Seems if a promise to pay at the promisor's or of a certain act by the promisor. Eg. on his return to London. Plea to various pleas & here to B. Com. Dig. "Pleader" C. 75. Cro J. 102. 273. 405 2 Saund. 145.

Quere as to Pltff. first moving on the above rule. Hob 68. 1 Saund. 44 contra.

So it must appear that it was given in due time. &c. (Promise to pay before ye end of such a fair as much as Plff disburse &c. in such case the Defe should have notice given before ye end &c. otherwise to Cate. 1 Roll. 464. l. 45. Com. Dig. "Pleader" C. 74.)

But if ye Defen. contracts to pay &c. on performance of an act by a Stranger, ye Plff need not aver notice; the Defend. must take notice at his peril. Eg. a promise to pay &c. when J. S. marries. 1 Roll. 462. l. 10. 463. l. 6. 2 Bulst. 144. Hob. 14. 2 Vent. 312. 315. 316. Com. Dig. "Condition" D. 9.

So in some cases, it seems, Defend is bound to give notice, &c. A promise by Defend to deliver so much rum when he shall receive it &c. Yelv. 112. 113.

In some cases, ye Plff must make and aver a special request. Eg. the Defend engages to do a collateral thing, (no way being first) on request. Com. Dig. "Pleader" C. 69. "Condition" D. 10. 11. 2 Salk. 231. Cro. C. 85.)

So to pay a "collateral sum" i.e. the debt of a Stranger; on request. 2 Salk. 308.

So to pay on request such sums, as the promisee shall pay for a fine. Com. Dig. Pleader, C. 69. Cro. C. 83. 4. 91. Request here is part of the consideration. — Caveat Lr.

Actual request is not necessary when the duty is absolute, or incidental to, or in performance of, the contract. promise &c. on which &c. the the promise to be done on request: for here the request is not of the ground of the action. Eg. a promise to pay on request in price of a horse sold or bought by the promisee. (See note *) The duty to exist without the promise - request not of the gist of the action. ergo. often requisite &c. Sufficient. 3 Salk. 308. Cro. C. 74. 2 Vent. 41. Salk. 23. 209.

* This rule must be understood of cases in which the sub-ject-matter of the contract does not vary the duty absolutely resulting. For the subsequent contract may be to a collateral thing or request &c. as to pay the debt of a Stranger. (infra).

Secus. (ex arte) of a promise to pay in others debt on request.

But the rule does not hold of a collateral promise - or promise to do a collateral act. e.g. if the hirer (ante) has promised to deliver a load of Wheat on request - request must be special. So a promise to pay a Stranger's debt on request. 3 Salk. 308. Com D. Pleader C. 69.

So in the last case the right of action is founded on the promise & request (there being no antecedent duty) Special request must be alleged. Com Dig Pleader C. 69. 3. Salk 308. Cro J. 183.

Where there is a Covenant that y^e Lessee shall repair and the Lessor find timber; the Lessee must demand the timber. Com. Dig Condition L. 10.

Where special request is necessary; time & place must be averred - it being traversable. Cro J. 183. Dodin. 231. Cro E. 85. Com Dig. Pleader C. 69. - Quere, Does this rule apply to cases, in which the General issue involves a denial of y^e request? - as the allegation is not then traversable Specialty. e.g. Indeb. assump. on a Bill of Exchange vs the Indorsee - "of which Defend had notice" - is Evasive.

So where a promise to pay, on condition that J. S. does not pay a request, a Special request to J. S. must be averred. Cro E. 85.

Quere, if an averment of special request, when necessary, not made by way of Defence. Com Dig. Pleader C. 69. 3 Burr 1. 209. Cro J. 183. Cro E. 74. 85. 1 Bay 183. Com^t

On promise to pay the debt of a Stranger upon request special request must be alleged. There is no antecedent duty - request is part of the agreement & is of the gist of action. (vide ante.) Salk 308.

Felonious Contracts. — Notice & Request

When a special request is necessary, the contract is revocable. When not necessary - not revocable. Salm. 389. 3 Salk 308. Cro E. 74. Dyer. Quaere whether qr. offer includes a denial of it as in Ind. assumpsit?

General rule. When there is a Contract to do any thing "on demand" and Defend. can not discharge himself by tender without request; special request is necessary. Eg. a Merchant engages to deliver such a sum in goods at his Store. So I suppose if a Mercht. engages to deliver such a sum in goods, at a time expd., yet he cannot tend. qr. goods. 3 Salk 308. Seems if to be tended by a Stranger, then the Merchant must req. qr. Stranger to choose. 3 Salk 308. All 25.

But when he can discharge himself by tender, special demand is not generally necessary. 6 Co 30. 6. Dr. 208. Cro E. 798.

The two last rules so far as they interfere with the particular ones before laid down, are subordinate.

If one accepts a bill of Exchange to be paid by his Banker at the Clearing House, presentment of B. bill at the place for payt. is prima facie necessary to give the holder an action vs. the acceptor or Indorser. Seems if the acceptor can be proved to have had no effects in the Bankers hands. demand at qr. place sufficient. Chitty 134. Stra. 1195 Bayley 78. 2 Mo. 181. 309. 511. Chit. 134.

Defences to

Actions on Contracts. By Judge Rives. 21. Nov. 1812.

I shall treat of the defences to actions on contracts generally.

To every action there is a General Issue. This is denial of the pltff's allegations. In the action of Assumpsit all the general issue denies the allegations of the pltff. still it does not always deny the promise. It often confesses it. For you may give in evidence under it, that you have performed the contract, that it was usurious, that it was obtained by duress, in fact you may shew any thing under this issue that discharges you from the performance. In Debt nil debet or non est factum of Debt, you may give any discharge in evidence. 1 Wms. Saund. 65. 6 Co. Rep. 2. 10. 11. By this you are not to understand you are obliged so to do, for you may spread upon the record the fact that the contract has been performed or that it was obtained by duress &c. We have however a Statute in Va. enacting that if the Defendt is discharged from performance by a release he must say this upon the record. I now proceed to the defences to actions on contracts generally. I shall first treat of the

Statute of Limitations. To any action which will lie upon a contract, which may be discharged by a release, the Statute is a good plea. By contract is meant an offer to pay a sum or perform a duty which the undertaker has contracted to

to perform. Tender must be made in the way the Stat. directs.

A prominent feature of tender is this. When tender is properly made, mode & form as it shall have equally the same effect, mutatis mutandis, as if payment was made, or the duty contracted to be performed, actually performed: it is equivalent in effect to payment or performance. The tender will discharge him from all liability on his contract, & any right which he could derive from payment or performance, he shall derive from a legal tender. Eg. A promises to deliver B. in 2 months, 50 Bushels of wheat at 2/ pr. bush. On proof of tender made bona fide (for it must be bona fide made) at the time, A can not support an action for the price, or avail himself of it in defence to an action for non performance.

2. part of the rule is this, that when a tender is hindered by the person to whom it is proper it shd. be made (as if he is not to be found) the debtor by proving that he was ready to have made it at the time & place, entitles himself to all the benefit which he would derive from an actual tender. If the debtor can prove that he went to the proper place, (as to the House of the Creditor if the contract was that is to be performed) at the time for the purpose of making the tender it is sufficient. The tenderee was absent, & the debtor cd. not tender to ye Walls of the House; nor de he was not obliged to call Witnesses to see him make a formal tender. It shall therefore have ye same effect as an actual tender.

3. part of the rule is that this plea of tender is a good defence in those cases only where the indebtedness is ascertained. But where it is uncertain or unascertained,

as where it sounds in damages, which requires the intervention of a jury to ascertain them, tender is no defence. As if A. promise or bind. B. or an action for damages A cannot plead tender. This is the rule of the Common Law. Where there is a particular Statute or rule for ascertaining the damages, tender is a good plea in defence.

There are sometimes Statutes which say a tender shall be a good defence tho' the damages are uncertain. As by a Stat. in Engl. when a man puts an Justice of the peace for an involuntary mistake, if the Justice tenders what the Jurors judge a sufficient reparation, the tender shall avail him, & be a good defence. And in some of the States they have Statutes on the same principle in case of involuntary trespass.

If a difference arises pro or after tender, i.e. the parties differ as to something posterior to the contract & makes no difference as where part of an account of a note is due & which the tender says is the whole pretium, that is due as a part has been paid, & the tenderee denies it, here tho' sums uncertain yet tender is allowed. We see that tender will be a good defence to any express assumpsit. So a tender of the value of goods will answer, for you will remember that that which can be rendered certain, is considered certain in contemplation of Law. The maxim is "quod potest certum reddi, certum est." and hence it is so in Book debt. Tender is a good tender in all actions of debt for the sum is certain: So also in Contracts & Covenants when the damages are certain or can be made certain by some known rule. But tender is never a defence in Trover.

If the contract is to pay a sum of money, & when tenders

the tenderee refuses to accept, the tenderor is not obliged to leave it. He must keep it, & have it ready at all times. Secus when the article is such commodious as where one agrees to deliver another a load of Hay &c. the tenderor at the time & place agreed upon & the tenderee refuses to receive it, the tenderor is not obliged to keep it, but may leave it at the place appointed, and it wholly discharges the tenderor from any liability in his contract, the property vests in the tenderee. The tenderor may & he must take the article home with him when it is refused or not be a trespasser ab initio if he does so, and if demanded on demand of the tenderee refuses to redeliver it, the tenderor would have his remedy in Trover, for he is a mere bailee. 2 Str. R. 1065. Ld. Ray. 210. 11.

This tender of money & the tenderee refusing to accept it, & the tenderor is obliged to keep it, is a discharge of all securities, as Mortgages, Bonds, Bonds &c. & pleads the tenderor upon precisely the same ground as if the money had been accepted by the tenderee.

There is a practice in Eng. & some of the States in the U. S. that when a man has not tendered, when sued he may pay the money into Court. This is a rule of Court. The effect it has is this. If the pltff. takes the money out of Court & accepts his costs up to the time. But if he insists that more is due & refuses to take the money & goes on to trial & it is found that there was enough tendered, he is not entitled to any costs. On the other hand you will remark that tho' plty. be entitled into Court by defend. in an action that he would be entirely due, and if the jury find a less sum due, pltff. will go for as much as he demands.

I have already remarked that the person who tenders the money is obliged, on refusal, to keep it subject to the demand of the tenderee: it becomes therefore a very interesting Question to determine, whether if the money be lost by inevitable accident, as by the burning down of tenderee's house, depreciation &c (as where paper currency is a tender) the tenderor or tenderee shall sustain the loss? It has been said that the tenderor must be the person, as a tender does not vest it in the tenderee, because he may sue the obligation. I apprehend, says the Judge, that some propositions in the elementary writers have given rise to the controversy on this point. They tell you "the debt and duty remains". So in a sense it does, as the tenderor becomes a Bailee of the money. But it does not follow that the bond or note is not discharged. A tender of money vests the property of it in the tenderee: but money being of light portage the Law does not consider it a hardship that the debtor still keep it in his possession as Bailee or Depositary for the Creditor. But is the original Note, Bond or other security discharged? If the tender was of cumbersome articles according to the Contract, & they were refused, the Debt is entirely discharged. And what good reason can be given why it should not be so with money? Why should the tenderor be subjected to the expence of the tenderee now in the Gaol than in the former case? I think, says the Judge, he is in the same situation in both cases, the Note &c is discharged. The Law makes the Debtor Bailee of the money, & when called upon by the Bailor (i.e. Creditor) the Creditor must be considered as tenderee: he must pay it. Now the only Question is, where is the money? They say if

A. owes B. the money & tenders it to him, & B. refuses to accept it, & afterwards B. sues the Note or Instrument &c. he recovers his money; but this reasoning is not conclusive. He does not recover the money by force of the Note (or Security, but recovers it, by demanding it from him as Bailee, and the money is paid in consequence of a legal demand. — B can demand it of A. at any time after the tender, & on refusal the benefit of the tender is lost. Thus being the true light in which a tender of money is to be considered, the only difference between a tender of that & a tender of other articles will be that where the tender is of money, the tenderee is obliged to keep the money as Bailee for the tenderer on his refusing to accept it, but where it is of a collateral article he is not obliged to become Bailee thereof, or ~~to~~ re-accept and ~~keep~~ keep tendered. But there is another reason of difficulty given for considering the matter in this light, that after as the Defend. often having tendered the money, & the tenderee has refused to accept it & then if the Pltff. demands it, & the Defend refuses to pay, the Pltff. will recover this debt & costs on the Note. How, then, they say, I appears this of the Note is extinguished? It is not, says the Judge because the Note gives any rights to recover, but because the Defend. keeps the money for the Pltff, & after refusing to pay it, he is estopped of pleading tender as his defence, for he can never plead tender without averring "that he tendered it at the time & place appointed, & is at all times ready to pay." 1 Brown Civ. Cas. 245; 1 Salk. 75. Cro. E. 389. Str. 777.

But all reasoning this Note to be various; there is nothing inconsistent in reasoning, that when a tender

an analagous case. A Law is made repealing a former one, & that the repealing Law is itself repealed, this ipso facto revives the former Law.

(It would be unreasonable to make the debtor do more than money is tendered than if the article tendered was collateral. Suppose A in Lichfield is indebted to B in Cardiff in the sum of 1000£. A goes to Hertford & makes a tender of the money. B refuses to accept it, in returning with the money A is robbed, ought he to sustain this loss for this additional trouble, when if had been a collateral article, he would not have been obliged to take any care of it?)

It is to be remembered in such a case that as long as the tender is kept good the debtor draws no interest from the time of tender to that of demand. As Justice Rowe says this privilege is suffered merely for the benefit of the Tenderer. When he pays off the money he is then by articles to get Note; thus preventing any charges from accruing after action upon it. Who pleases a fool loses.

It is no great difficulty for the Defendt to take care of the money when the tenderer refuses to receive it; and also the the Pltf be as capricious as he can take care of him, and says that the Defendt must keep the money subject to the Pltfs demands, but does not impose upon the risk; viz Casualty as robbery depreciation &c after the tender was duly & bona fide made. But in numerous articles it will be difficult for Defendt to take care of them & therefore is not obliged to.

It is the Law of all Countries that tender discharges

the debt; and the petition denies all the advantages (in tender) which he c. from an actual payment. To illustrate this principle. Suppose B. to have agreed to make a lease to A. on c's paying him 20 £. A. tenders the money which B. refuses to accept. A. may then bring an action and recover and of B. the value of the lease (or Pty. will decree a Specif. ce performance) though the money on his own part, & all this seems reasonable when we consider the money as resting in the tenderer or the tender, & that the tenderer retains it merely as Bailee, & as such is liable for it.

If the pff. (or tenderee) is incapable & has left no agent, & the Defend. (or tenderer) was ready to tender, though he did not make an actual tender, the money ran over his interest from that time, for no man is obliged to follow his Creditor out of the Realm to tender money. He is to suffer no inconvenience from the incapability of the Creditor. The Debtor must still keep the sum & no way by him, & always be ready to pay them called upon, or he might lose the benefit of his tender. This shews that the money is not his, for were it his own he would be at liberty to do as he pleased with it. The Defend. may not pay interest in such case. The loss must fall on the pff. who is absent. This principle was fully established by the French Parliaments in this Country during & some time after the American Revolution. Where the distinction first arose in this Country there were no Authorities in the City Books to be found. But there are both two old cases relating to it. They are to be found in Paris's Pr. 18. Ry. See also 3 Bac. Ab. Tender in Ejectment also in 1 Ryan 81.

In the time of Queen Eliz. certain pieces of money were made current in Eng. by Proclamation, and during the continuance of the Proclamation, a person who owed a debt made a tender of these pieces, & the creditor refused to accept them. After some time when the proclamation was at an end, the money depreciated in value & the tenderee brought his action. The Defend. answered tender, and the Ct held that the loss must fall on the tenderee & therefore the money was holden to be the tenderee's.

The reason why this Question became so important was that it arose out of the situation of our affairs at the close of the Revolutionary War. In the commencement of the War several persons fled from the country, and were declared (not Enemies) & left many persons here indebted to them. The day of payment having arrived during their absence, a tender was made in Continental money which was made a Lawful tender by Statute. Afterwards this money depreciated in value, & a Question of some importance arose at the close of the War to determine who should sustain the loss? While it was a legal tender it was good & was considered as a discharge of the debt, & the loss of depreciation fell on the tenderee. After the close of the War a Statute was made vesting the Courts with power to settle this species of claim equitably & according to the principles of Justice. One of this Statute grew an important Question. In the Treaty between the United States and G. Britain, there was a Stipulation on the part of America that the debts due to English subjects should not be impaired by any subsequent Law. This Stat. was made after the Treaty

and the English claimed that it impaired contracts, & was under its construction the debtors came off with less than their dues, & in consequence thereof that it was contrary to the provisions of the treaty. Congress recommended to the several States to pass remedial acts upon the subject. In consequence of this the Legislature of Geo. passed a general Stat. upon the subject, repealing all laws which were contrary to the provisions of the Treaty, thus leaving the Question open for litigation upon the Courts.

The Question came up before the Courts, and the argument was that the British Treaty had secured to creditors their debts. This was admitted, but it was claimed that altho the Treaty had secured to them their debts which were due, yet those debts were discharged by a law, which subjected them to the loss. The Question was, what was due? The Creditor by leaving the Country was inaccessible, & the debtor &c. not tender the money which was then due, & therefore the inaccessibility &c. will not discharge the Interest in the debt. For being ready to tender in this case is equal to an actual Tender. Suppose he had tendered what will the Creditor have been entitled to? The answer is the principal only, & no interest. The treaty therefore secured to him only the debt due at the time of the tender, provided the tender was Gold & Silver. But the tender was a legal one, tho not Gold & Silver. It was paper money made current by law, & the treaty secured no more than was due, & that was the value of the money tendered, which was in paper. It was said this was dishonest - but how can that be? a man could not refuse it when offered to him.

for it was a legal tender, and as a man was compelled to receive it he might honestly & conscientiously pay it away. The loss fell on the Tenderee and so it was determined by the Courts. After tender, they decided, the money became the property of the tenderee & he must therefore bear the loss by its depreciation &c.

These decisions seem to have satisfied the British Government of the correctness of the principle, for they relinquished the claim & has never since been resumed.

It is therefore now settled that in all these cases that the tenderee must bear the loss - the money is his - after the tender the Defend. must come to the Defend's house & demand the money, - The Law is obliges the Defend. after tender to pay, but he is entitled to the Note, & the suit must be brot upon the Note, that it may be taken off the rack of the pff. (ut ante). If you tender a cumbrous article as a Hhd of Rum, & the tenderee refuses to accept it, if you take it home with you, you must deliver it on demand or you will liable in Trover.

Tender may be made either by or to a man's Exor. or Admr after his death or intestate death, for what the Testator &c. do, or might be done to him, may be done by or to his Exor. or Admr. - 3 T. R. 684. 3 Bac 4. (5 Co 115 or Co Lit 115).

What is the proper mode of making a tender? Sup pose the debtor goes to his Creditor & says "Sir I come to pay you your money" and has it in a Bag under his arm: this is not sufficient to constitute a good tender. - He should take it from under his arm & say "I have come to pay you your money and here it is". But he need not count it; it is the duty

the tenderee to count it. If the tenderee was not there, he was not bound to take the money from under his arm & make a formal tender - if he was ready to pay it is sufficient. So in case the tenderee had been at home, & when the debtor began to tell him he had come to pay &c. the tenderee said "out of my house, I'll not have your money" in such case he need do no more, for the tenderee thus evinces a disposition not to receive the money, and the tender is good. 5 Bac. Ab. 5 Co. 115. 3 T.R. 684.

It has been made a Question whether if there is more tendered than the amount due, is it a good tender? But there is no doubt, says the Judge, but the tender is good, for the tenderee may demand the surplus paid by mistake, & on refusal to refund, may maintain an action for it. Bro. 46.

It is ~~said~~ settled that the person tendering may direct the application of the tender. As where he is in debt on Book debt & on a Note, he may direct the tender to be applied either to the Book debt or Note. If he does not direct the tenderee may apply it to which of the demands he pleases. And to make a good tender there must an actual offering of the thing tendered, when the parties meet. 2 Lev. 209. 3 Mod. 104. Co. Litt. 115. Co. Ent.

It is said if a man engages to deliver one of two things he must tender both. But this is not so. The rule can hold only where the contract is to deliver one of two things at the election of the tenderee & so are the cases. Where it is as is generally the case in the alternative, namely a tender of either is sufficient. 1 Roll. R. 14.

( ) What may be tendered?

When the Law prescribes what is to be tendered, that & nothing else, shall be a good tender; but where there is no Law the Current money of the Country is a tender according to the current value of it. The Legislature may always fix what is a good tender. 5 Co 114. Tender of money in a Bag is good, as I before remarked. 5 Co 115.

The Law makes Copper coin a tender in Eng. by proclamation. And in this Country our Cents are made tender by Law; but a great quantity of them can not be tendered. When the Law says Copper coin shall be a tender it merely means by way of Change. This Question was decided many years since in New York, where a man collected several Barrels of farthings & had them cast to his Creditors house, to make a tender of them, the tendree refused to accept of them & the Ct. determined that this was not a legal tender. (A Story by the Judge). A number of years ago, when I was practising at the Bar, I obtained a trifling judgment vs. a man (as atty.) in which the Costs amounted to about 10$. He was much vexed at being beat, & asked me if he could not settle the costs with me. I told him "Yes, and he took me out in to the Lobby of the Court House, & produced a pair of saddle bags of coppers, & tendered them. I accepted them - the man was somewhat disappointed and requested me to count them. "Oh no Sir" I replied, I will trust to your honesty, & am moreover very much obliged to you as I am about starting a journey to Vermont, & I can throw them into the bottom of my Stage & they will be the most handy change I could have on the road. The poor Dejected man

went off quite mortified, that his scheme had failed.

If Counterfeit money is tendered & accepted, the tenderor according to the old rule must bear the loss. But that is not now the rule. The tender discharges the obligation but does not leave the tenderee without a remedy. He must give the tenderer notice that it is counterfeit, & if he refuses to receive it back & pay the amount in good money, you can see him & will recover. It is similar to any other case where Counterfeit money is paid. As if A. buys a Turkey of T. N. & pays him a counterfeit. Sells for it, when he finds out that it is counterfeit A. must give notice of it to T. and if he then refuses to pay in good money, A. can maintain an action agt him, for the price of the Turkey. Leo Lit 208. 5 Leo 115. (Sc. Fa. 23. 1817. Lecture 2nd

Money which is current according to Law is the only good tender, (Russia &c) but it has been decided by Chancery & in a Court of Law that Current Bank notes are a valid tender, when no objection is made to them on that account. They are of themselves no good tender, but when tendered & there is no objection made the tender is good. There is a case in 5 (6) Term Rep. from which it may be gathered that the Court were of opinion, that if nothing was said they constituted a legal tender, and that no objection as to the standard raised on the score of their being Bank notes. In this Country Bank Bills have not the same currency as in England. and therefore when a tender is made in them they must be Bank notes current in the place where tendered. 5 Leo 64. 552. 1 Burr 452. 5 Burr 2 Ves cites the Lyddy Case supra.

Defences to Actions on Contracts. Tender.

Of the place of Tender.

A tender of the debt must be at the place, if it be so in the Contract, but where that is not fixed, and the debt is of money, the general rule is that the place of tender follows the person of the Creditor, he remaining within the realm, at his place of residence. A man is obliged to follow the person of his Creditor out of the realm to make a tender, unless the Contract was thus made, as if in Eng. he had covenanted to pay in Scotland or Ireland he must do. the maxim is "ejus est solvere cujus est habere". But where the Contract is made in Eng. the debtor is not obliged to follow the person of his Creditor into Scotland or Ireland which are under the same Government. 6th Rep. 20. 2 Bls. 11.

This is the rule in England, what rule would be made here I know not. There can be no Question but that the Common Law rule applies here in general. It is yet unsettled and I can lay down no determinate rule upon the subject, but have no doubt that if the Creditor were to remove from here to New Orleans the debtor wd be excused from pursuing him there to make the tender; for it is his duty to leave an agent here to receive the money. Neither do I think the rule can be limited to each State; for suppose the Contract was made in Con. near the line separating us from N. York & the Creditor should remove into N. York a small distance, the debtor I think wd be obliged to make the tender to him in N. York. The rule I think wd be established on reasonable grounds, for it wd be very inconvenient to compel a man to go from Georgia to Maine to make a tender, and if he has been

bind it by his contract so to do. This is merely my opinion says the Judge, for there is no certain rule.

The general rule is that the tender must be made to the person. You are not to understand by this that the tender must be after having gone to the Creditors house, & he is absent, & it is the last day that the tender can be made is to follow the Creditor. If the Creditor has left no-body the tenderer has done all he is required to do, by going to the house of the Creditor at the proper time, ready and to pay or tender the debt. But still he must keep the money by him & be ready to pay it over when called upon. The tenderer cannot by any subsequent act of his, prevent the tender or form having the benefit of his tender.

There is an exception to the rule in Eng. founded on the privilege given to Freemen of London, for there must may (by custom) be tenders on the days, as at the Exchequer house, or at the Stewards house, if there is a Steward appointed. No such rule in this Country.

There been going on the ground that no place is fixed for payment, and the rules apply only to the payment of money. When the contract is to deliver but by, heavy articles & no place is fixed, the rule is that they are to be tendered at the tenderer's dwelling house, i.e. where he lived at the time the Contract was made. His residence at that time is the place fixed by law where the tender is to be made. He is not obliged to follow the tenderee to make a tender as in the case of money. But the rule as to bulky articles is to be understood with certain limitations: viz. if it is no more inconvenient for the debtor

to deliver the articles at the new residence than the old, he must deliver them at the new residence. (Miller 1822). Now you will observe that the Law does not regard a trifling difference, the maxim is "Lex non curat de minimis." If it is reasonable that he should deliver them at the new residence, he must do it, altho it might be in a slight degree more inconvenient than to deliver them at the old residence. The Creditor may in some cases change the place of delivery when he moves away, but he cannot do it when it would be more inconvenient for the debtor to deliver there. Suppose a man in Shelburne had contracted to deliver Mr Fanning of Wardington 10 Barrels of cider, if Mr F. moves to Charlotte he may by visit the delivery of the cider at Charlotte, & the debtor will be bound to deliver the cider there, for it would be no more inconvenient for him, than to have delivered at Burlington, the distances being nearly the same: 3 Bac. Ab. 715. 5 Bac. Co. Lit. 211.

I have been treating of the mode of tender, to whom it is to be made, & the place where. I shall now consider the

Time of Tender.

If there is a day limited for payment by the contract that is the time tender must be made. This is very plain & simple. Suppose the contract is to pay "on or before a certain day" the legal time is the last day limited. The Creditor is not known when the tender would come, and he is not obliged to remain always at home, for fear the debtor will come in his absence and the Law intends that both parties shall be present, and therefore it has held the tender in order to be good must be made on the last day when

it must be made. And the Tender must not only be made on the last day, but on the "uttermost convenient part of the last day." By this is meant, that the tender must be made at such a time of day that the money can readily be counted in day light. Some say it must be so that the money can be counted before Sun set. The former is correct. It depends in a great measure upon what the article is, & its quality, for some articles would require much longer time to tender them in than others, as Cattle &c. You are not to understand from this rule that where the Contract is to pay "on or before" such a day that a tender cannot be good unless it is made on the last day. If the payment must be before the last day a tender is made it is good. Com. Dig. 14. Co Litt. 202. 206. Salk 624. Stra. 77. 3 Esp. 104. 5 Co. R. 114.

I have said that tender must be made on the uttermost convenient part of the day fixed for tender either by Law or by the Contract. Now suppose the debtor sh. go to the Creditors house before Sunrise & he should not be out of Bed. This is not a good tender, but if the sh. meet with the Creditor, or find him risen & tender to him, it would be a good tender. So where the Contract is to pay or do so & so, & they meet with each other & tender is made, the before the last day - it is a good tender.

Sometimes it happens that an obligation is given, & the time of payment is not fixed, tho the place is. In this case it is the duty of the debtor to give notice to the Creditor when he will pay. He is liable to be sued at any reasonable time. But suppose neither time nor place is fixed? I know of no rule governing a case like this. But

Assignee. delivery may be made without notice at any time at the usual place of abode of the Creditor. There may be a difference between this and the last case, as there it is presumed that he is at home or has an Agent there. 4 T R. 173 1 Salk 323. 6 Co Litt 24. 9 Co. 76.

Since it has become common to assign even instruments, as Bonds, Notes &c. which are not negotiable, some important Questions have arisen upon the subject. To whom in these cases ought the tender to be made? The Debtor is safe if he tenders to the assignee, in case he pays the Bond &c. But is he discharged by tendering to the first obligee? In negotiable Notes the property vests in the assignee at law and the obligor must pay to him. But it is otherwise with a Bond, which is not negotiable, the legal property does not vest in the assignee. It has become common to transfer them and Chy says that payment must be made to the equitable owner. In Law how is it? I have no hesitation in saying what I think is correct in this case. When a man has once acquired rights which can be enforced, it seems strange to say that tender (in consequence payment) can be made to another who has no rights & by so doing barr the rights of the owner. I say that in this case, the assignee has the right and tender should be made to him. The Creditor cannot assign the instrument so as to make it more inconvenient to the obligor. When the rights are equal there can be no Question. and here Chancy. says the assignee has the right and the obligor must tender to him. But in cases where the obligor wants to put it in his power to by tendering to the assignee, as

as when the condition of a bond was to deliver 500 tons of Iron to J. & B. Burlington and Brownsford the Bond to B. living at St. Albans and afterwards becomes a Bankrupt, in such case the assignees must come to Burlington to receive the Iron, or appoint an Agent to receive it for him. By so doing he may prevent its being paid into the hands of the Bankrupt assignee, by which he (the assignee) would be a loser, & it renders it no more inconvenient to the Obligor. By proceeding in this, in my Mind justice will be done. Lord C. Hardwicke have said, if the obligor will knowingly pay the Bankrupt assignee, & thus put it in his power to defraud the the assignees of it, he shall be compelled to pay it over again. Moor. 137.

On Tender & refusal.

Suppose there is no doubt but a man has a security which is gratuitous, as a gratuitous mortgage, tender & refusal discharges the lien on the land. As suppose J. S. tells a young man living with him that he will pay him $3000. & gives him a Mortgage for that sum, conditioned to be void when he shd pay him the 3000$ and sometime afterwards he tenders him the money, but he refuses it, says he does not want it then - (thinking himself safe by having a mortgage, there was no preceding Debt, but it was merely gratuitous, the duty & lien on the land are discharged, by the tender & refusal, and the person can have no remedy at all for he has no longer any right to it. 2 Ves. J. 245.

Where a bond has the same effect as an actual performance. Suppose the case of a Mortgage.

Tender at the day fixes the title in the tenderer. It is however prudent to get the Deed back, as the witnesses to the tender may die after some time. but it is of no use, to re vest the title. If he will not give up the Deed, upon application to a Ct. of Chy. they will compel him to give it up. But suppose the Law day has past, tender will not revest the title. neither would payment. All that either would do, would be to enable the person to apply to Chy. for relief. In this case tender has the same effect as payment & so in all other cases tender has exactly the same effect as actually as payment. Cro J. 245. Cro E. 888. 2 Ld. Ray. 886.

There is a rule in the English Law which I think contains the doctrine of tender to wit "Where a man is bound to perform a collateral act, if he tenders his services and they are refused, he is entitled to the same rights as if he had actually performed". Eg. A agrees with B for $1000 to build him a Barn of such dimensions, but when A comes with his workmen &c. at the times specified in the contract, B. refuses to let him proceed & drives him off his land. A. tendered his services but B. refused to accept them. Now A can bring an action & recover the $1000 from B. the same as if he had performed. They carry the rule through, for they will afterwards compel him to perform. If in a contract to pay money you tender it & it is refused you must keep it & be ever ready; so also in this case he must perform the Work hereafter. But this is not right, for he may have other jobs on hand. &c. however it preserves the principle. In Equity we consider the contract as broken up. and the Jury are directed to give ample Damages for his disappointment. There is

him, no election on the Contractor to do the work afterwards. This is the most reasonable way. 2 Ray. 686.

I shall now give a number of Authorities applying generally to all the foregoing rules. - 9 Co 79. 2 Roll 523 Cro E. 755. 1 Show 129. 2 Ch Ca. Cas 206. 2 P. Wms 378. 1 Brownl 71. 2 Saund 352. 2 Ray. 964. Co Lit 207 10. 11. 1 Salk 75. 1 Show 777. 3 Bac 14.

Manner of Pleading Tender.

When tender is pleaded the pleadings must square with the rules which constitute a legal tender, i.e. every incident which is necessary to make a valid and effectual tender must be set forth in the plea or the Plff may demur to it. It is not sufficient for Defend to say he tendered according to Law. It must be put upon the Record for the Court to say whether or not it is according to Law. He must plead that he tendered on such a day (being the day prior) and actually offered the money due on the uttermost convenient part of the day. And in case the Creditor was at the place to meet him, he may plead full tender, & need not plead that it was the uttermost convenient part &c. And it is necessary to state that the Plff refused to accept. This is the form, viz. to state a refusal and you should not depart from it unless you have a good reason for so doing. Suppose the Creditor was absent, then the Defend must plead that he was ready &c "and that Plff was absent from home." He need not state a refusal in such case. After verdict a tender is good though a refusal is not stated. If the contract was to pay "on or before" such a day the Defend must plead that he tendered on such a day & that it was

the last day. But in case he had paid the Plff before the last day and had tendered to him it would be good, and the Defend. may plead it. If it were money it will not do merely to say he made a just tender of the amount due on the day fixed, for the utterm[ost] convenient part of the day, & that the plff refused to accept, but in addition to all this he must say that he has ever since been ready & still is ready to pay the same & then he must produce the money in Court; and in all the pleas mentioned above, the conclusion must be in these words "that he has always been & still is ready" &c. Secus where it is a tender of cumbrous articles, he need only state in his plea a tender according to the terms of the agreement; a refusal in a tender of collateral articles being wholly immaterial: the mere act of Tender fully discharging the Defr. from any liability - S. Ray[d]. 687. 1 Salk. 624. Cro J. 423. 1 Salk. 223. Cro E. 888. 1 Stra. 458. 7 D. R. 139. 7 Co R 10. 1 Sid 31. 1 Mod 581.

Lect. 3. Nov. 24. 1819.

From this you see then, that in a common case of money being due and it is necessary for Defend. to plead that he made full tender on a certain day, which must appear to be the day fixed for tender, and also that it was on the uttermost convenient part of the day, & that the plff refused to accept the money, and that he (the Defr) has been ever since & now is ready in Court to pay the same, and then he must produce the money in Court. This supposes that the plff. was present at the place of payment at the time of tender. But suppose he was absent & in such a manner that it was impracticable to

to tender to his person, the Defr. no Agent. - in such case no tender need be pleaded, nor refusal of the Pltff. to accept y^e tender, but only a readiness on the uttermost convenient part of the day fixed for payment & so continued & at present is in readiness. If payment is to be made, or to be done such a day the made of pleading is not altered in a common case. The Defend. must plead tender on the last day. Yet if he had paid the P^ff. before the day & had tendered to him, it would have been a good tender & he may plead it. And in all such cases where the tender was of money he must conclude with "that he always has been & now is ready" &c. - If the Defend substantiates his plea in this manner he effectually bars the Pltff. of his action - and the pltff. will be liable for Costs, though he is entitled to the money produced by the Defend. 1 Ld Raym 23. 2 Brownl 109. 4 Co R. 79. -

When the pltff. replies to this plea of tender he has a right to traverse any part of it which he thinks is untrue. - He may reply not a penny tender, or an after demand and readiness, which denies that he was always ready, & if he can prove his replication it effectually overthrows the plea. The effect of his replication stating an after demand is, that he will gain his Interest if he can substantiate the replication. Unless there has been this refusal the Pltff. only gets his Principal which is in Court. 1 Show. 254. 1 Salk 622. 4 Mod. If the Pltff. denies that there ever was any tender, if it is made out to him, it is so he can't take the money out of Ct. But there is no Question but he is entitled to it. If this is not the case, the whole doctrine of tender is destroyed. 1 Stra. 597. -

If a tender is made in collateral articles the Defendt must plead tender at the time & place according to ye terms of the Contract, but must not plead "always ready", nor a refusal. There is a practice in Eng. for the Defend to bring the articles into Court after they are not bulky, and this also in an action of Trover, as Jewells, Silks &c. This is regulated by a rule of Court: and our Courts can make such rules, as matter of convenience. This practice obtains where the suit is for the restitution of the specific articles, as Jewels Family pictures &c for which the owners have an affectionate regard, and they would be of trifling value to any other person than the owner. The Law gives such Damages as will be sufficient to enforce a restitution. The Eb action of Detinue would lie, but it would not answer the purpose better than any other action. Chy would compel a performance and Courts of Law can give damages to answer that purpose. Remember this rule, that what a man brings into Court is an admission that so much is due. This is incident to all Courts I presume. By this bringing into Ct. the Deft is estopped from denying any thing, even the Execution of the instrument. He is to pay all costs which have arisen before the tender into Ct. but none afterwards if the tender proves sufficient. 2 Ld Bc. 374. 174. 3 Bac 602 1 Vs. Bc. 90. 4 T. R. 464. 479. 3 T. R. 635.

In Cont. we have no rule about bringing into Ct. The reason is our law of tender is different, and so it is in many of the U.S. by usage. The Eng Law does not admit tender after action brought. But here tender may be made at any time, even while the cause is arguing to the Jury. But after suit is commenced, tender must be made of the Costs likewise. And this is a rule of Chy - & is adopted in many of the States.

Defences to Actions on Contracts.

Insanity is a defence to an Action on Contract, and in Assumpsit and Debt it may be given in evidence under the general issue. But where the action is founded on a specialty, Insanity must be specially pleaded, or spread upon the record. But is Insanity pleadable in Bar to an action for a Tort? The Books say that it is not and Judge Story thinks it is correct that an insane person is liable. For the intention is not considered in an action of Trespass vi et armis. The action is brought to recover Damages for the injury & not to punish him. But when malice is necessary to maintain the action as in Slander &c. Insanity is a good defence. And it is a general rule, that in Slander or other actions on the Case, when it is necessary there should be a malicious & wicked intention moved in order to maintain the action, that insanity is a good defence. But in other Torts it is not.

Coverture is a good defence to an action on Contract. A Feme Covert may plead Coverture to a Bond, for all her Contracts are void (except concerning her Real property). If a woman promises to perform, after her coverture is terminated, that she contracted to do while a Feme Covert and tells them was a prior moral obligation also she is not bound by her promise.

Infancy is a defence to Contracts. When a minor is sued he pleads that the Def ought to be barred for he was a minor; and it is a good plea and yet the Pltf may defeat it by showing that the Contract was for necessaries, and that he was liable for the value of them to himself

Defences to Actions on Contracts.

Minors are in truth not bound to enforce contracts on which the suit is brought, but on a Quantum valebat. The Pff only replies "necessaries" and not what the articles were. The answer to this is "not necessaries." When the Defendt has pleaded that the Pff ought to be barred as he (the Defdt) was a minor the Pff may reply that "he promised after full age." The suit is brought on the first promise, which is set up by the second promise. I have never seen but one action brot on the second promise. but I cannot see why it might not be done. tho it is altogether unnecessary. Infancy is no defence to Torts except before the Infant attains the age of 7 years. After 7 there is no rule saying they cannot be punished for Torts - it is doubtful - the maxim is "malitia supplet aetatem." The enquiry after 7 years of age is, was he doli capax? If he was he is liable & may be hung for murder. There is a case which lately happened in the State of New York. An Infant under the age of 9 yrs was convicted of murder & sentenced to be hung. The Governor recommends the Criminal to the Legislature for a mitigation of the sentence on account of his age. (A.D. 1812.) After 14, yrs of age there is no enquiry whether he was doli capax or not - he is at that age liable for his Torts as an Adult wd be. It is said an Infant is not liable for Murder till 17. But I see no such authority. He is certainly liable at 14. It is said in Hoy ... that an Infant is liable for Murder at 17. and hence the inference is drawn that he is not liable before, but the inference is illegitimate.

Defences to Actions on Contracts

Impossibility of performance is a defence. If the performance is prohibited by law or prevented from performing by the act of God or the party himself, when sued he may set it up as a defence. Contracts which are illegal are considered impossible. Illegality of Consideration is a defence, which in Assumpsit must not be pleaded, but may be given in evidence under the general issue. But in an action on a Specialty, it must be pleaded. So may any thing which shows the illegality of the instrument. Nil debet may be given in evidence under the general issue in Assumpsit. But it must be specially pleaded if you wish to defeat a Security. For this only avoids the Security, but does not discharge the Debt. So when there is a total Want of Consideration, it appears on the face of the Instrument & may be demurred to. But when there is a Bond given the law implies a consideration, & this presumption cannot be rebutted. But the presumption lasts no longer than the consideration appears: and therefore in a Covenant if there is a consideration appearing not recognized by Law it may be demurred to as above, for the Declaration shews the consideration not to be a good one. In such case the Covenant is no better than a parol Contract. Cro Jac. 68. Salk. 548. 2 Wils 351.

St. Jones to Actions on Contracts.

Statutes of Limitations.

The Legislatures of most States have thought proper to limit the time within which actions may be brought for the redress of pecuniary injuries arising as well from the non-performance of Contracts as from Torts. The time limited is different in different States. In Conn. it is 17 years in New York 6 years &c. In the application of these important States of limit? some important principles are involved, and the cases in which they are said to be disclosed, are often said to be unintelligible or inreconcilable. I think I can give you the great governing principle upon the subject. I collected my opinion from scattered cases, on comparing them, can find no contradiction as to the principle I shall give you. A case of considerable importance came up before the National Court in Con. & was decided on the principle which I take to be the true one, and that principle was directed by Judge Nelson to be entered on the Records, but the Clerk by some mistake omitted it. The Stat. of Limitations may be pleas in Bar to any action whether Assumpsit or not, upon a Contract within the Stat. of Limit?. But you find it said in many Contracts that the Stat of Limit?s does not run upon them" or that the Contract "is taken out of the Statute". When the Stat. has run upon an a promise as aforesaid is made, this promise takes it "out of the Statute" and if a promise is made one year (or at any period before the end of the time) it prevents the Stat. from running

on the Contract. There are many Ds. to cases.

I will mention the three hypotheses insisted on by Judges & Lawyers. The first Dr. has a plausible appearance but it is altogether fallacious. They hold "that the "ground on which a recovery of a debt is barred by the Stat. "is, that the Stat. has reduced to a certainty that, which "before was uncertain. It is the presumption that where "the debt has laid a sufficient length of time to bring it "within the Statute, that it has been paid tho' the evidence "of that payment has by some means become lost; & there "fore whenever this presumption of payment can be rebutted "the Debt must be considered out of the Stat. - It is not "on the ground of the debt being old, but on the ground of "its being paid - and if it is paid the man should not be "harrassed by being drawn into Ct. & compelled to pay "it again." This is specious plausible, I say, but is is contradicted by the Authorities. They say "here is a Debt barred by Stat. and it is presumed it is paid, but this presumption can be rebutted, as the Pff may come & prove that one year ago the Defend. promised to pay, or that six months ago he paid one half of the note, which was in consideration of his indulgence to pay now, & the Law raises a promise." But Judge Tucker remarks, if we consider the Spirit of the Stat. to be, as declared only of the parties how will it reconcile the cases? for they are wholly irreconcilable with this doctrine.

When the Defend acknowledges the Debt, says he pays it, tells the Pff the Debt exists but says the Stat. has run upon it & he will not pay; this rebuts the presumption of

its being paid, yet the Creditor cannot recover. How will this doctrine agree with the Chancellors decree, where a man in his Will directs all his just debts to be paid? Here they decreed that those barred by the Stat. should be paid. (Cases in 1 Binney 289. Swalls Laws of Penn. Vol. 1. Smith v. Bolton) Now if it had been considered as they that in legal presumption those debts barred by the Stat. had been paid, it was very unjust to decree a second payment. If they were paid, they were not debts now, yet they directs to be paid. If this doctrine is correct, the Will keeps over all Laws. If it goes on the ground that the Chancellor wished to favour the Testators intention, it is the same thing, for how does he know that it was the Testators intention? They must be guessing at debts. Again - on what ground could the Court have proceeded when they determined, where a person who had been a Bankrupt, and had paid his Creditors only 10/ on the pound, advertised (after regaining sufficient property) for all his Creditors to come in & he would pay all his Debts, that those Debts barred by the Stat. should be paid? If they had gone on the ground that in presumption of Law, a debt barred by the Stat. was already paid, they could not have inferred that the person advertising, when he promised to pay "all his debts", promised to pay those which in presumption of Law were no debts.

A Second Hypothesis is they (which I think is equally false) - It admits that there was no presumption of the Debts being paid, but that they were debts due in conscience, tho' not enforcible at Law, & that the promise to pay was supported on the principle of moral obligation. On

this ground in the cases before put no recovery could have
there had been a new promise to pay. If this is correct the ac-
tion must be laid on the last promise. but it is not so.
on it this were the case a new promise must always be
shown to have been made either expressly or impliedly.
This however is not the case, the action must be brought
on the old promise there having been a waiver of the
Stat. Nothing is necessary to be shown but that was
now. E.g. An Executor of a Creditor calls on a debtor whose
debt was barred by the Stat. and he promises to pay.
Now the first promise was made to the Testator and
on that, the action was brought. and the last promi-
se was introduced merely to set aside the Stat. And the
principle is fully established by the decision which
made the Debtor liable, he having acknowledged the
debt pending the action: in which case the action must
have been laid on the old promise, there being no other an-
tecedent to the commencement of the action.

The Third Hypothesis is this, which Judge Kane says
is the true one, & which is sanctioned unanimously by the Jus-
tices of the Supreme Court. The Statute of Limitations was
not made on the ground of fixing between the parties, but
on that of public policy to prevent persons from neglec-
ting to collect their debts in a reasonable time, & the con-
sequent intricate disputes & litigations which such neg-
lect must give rise to: and it puts it on the power of the
Debtor to remove the payment at the end of a time. This
Hypothesis states the Creditor to collect his Debts in a rea-
sonable time: and as a person may always waive a

rule of law in his favor, so in this case by a waiver of the Statute, the Debtor subjects himself to the payment of the debt. and from any slight words of the Debtor the waiver is implied: and remember if he has once waived the Stat. by pleading payment &c.) he can never afterwards avail himself of it. If the Debtor say "I will not avail myself of the Stat." it is a waiver. When a Debtor says to his Creditor, "I acknowledge the debt, but I will take advantage of the Stat. to make you do me justice" and all the other indebtedness was admitted, yet it was holden that he has never waived the Stat. So where the Debtor says "The Debt of £2 you have against me is unjust, I will do you justice by paying you £5." the Court held that it was not a Waiver of the Statute. But in this case of the Creditor had brought his action for the £5. he could have recovered it. And in the cases I mentioned above, where a man in his Will directs "all his just debts to be paid", where the Testator dies and those barred by the Stat. were included: and the other, where the Bankrupt after having acquired property, advertises for his Creditors to come in & be paid them, the Court determined that those barred by the Stat. shd be paid. These decrees in Chancery & the decisions at Law were made on this ground, which is indisputably the true one, viz. that the Testator by his will, & the advertiser by his advertisement, has waived the benefit of the Statute. And all those cases where the Debtor has been made liable (notwithstanding the Statute) may be reconciled on this principle of Waiver. There is a case where the

a Debtor became insolvent, a Creditor to whom considerable was owing, whose debt was barred by the Statute petitioned at the Debtors request for a commission of Bankruptcy. he obtains it & the other Creditors wishes to set it aside because his debt had been barred by the Statute, but it was determined that the Commission was good; that the Debtor had a right to waive the benefit of the Statute, and he had done so. —

Any slight acknowledgments to bar the debt are out of the Statute, and amount to a waiver; as where a debt is on a short time & after the time his debt will be barred by the Stat. wrote a Letter in a dubious manner including to make what use of it he pleased afterwards: it meant any thing or nothing as the Jury pleased — and the Creditor supposed it amounted to a promise to pay the debt: this was decided to take it out of the Statute, although after the time expires the Debtor refuses to pay, saying the debt was barred. And if a man should voluntarily pay a considerable part of the Note &c before the expiration of the time, this is absolutely a waiver of the Statute: at the time he paid he admitted the debt was due, and tho' some probable he did not intend to take advantage of the Stat. I do not know how the Law will be, if he was compelled to pay the first half.

When there is an express declaration of the party that he will avail himself of the Stat. we can only judge no intention of honest Payment, & consequently no waiver: and the fact that there is an acknowledgment of a debt, but in such a manner that no waiver can be

implied, he will not be liable to pay it, fully established is the idea that the Stat. does not proceed on the presumption that the debt has already been paid. If the debtor makes no objection, but acknowledges that the debt is due, you may fairly infer that he will pay, & that he will not take advantage of the Statute. It is not necessary to prove a promise to pay; if such things are proved as amount to a waiver it is sufficient to take the case out of the Statute, or to prevent the Stat. running upon it. To an action upon a debt within the Statute, "non assumpsit" being plead amounts to a waiver. If the Debtor would avail himself of the Stat. he must plead "non assumpsit infra ___ annos" the number of years limited by the Statute.

So that it is a rule if the Defend. who sues does not plead the Statute in Bar it is a waiver. You cannot demur to a Declaration which states a debt contracted so long since that the Stat. ~~within the Stat.~~ will run upon it; because as we have already seen some debts are not within the Statutes. But to have advantage of the Stat. it must be plead. Altho this was formerly questioned it is now settled says the Judge, altho there were formerly decisions on both ways & altho Lawyers in any State be of different opinions yet the decision unanimously had in the National Court in the case of Pintard v. Martin is acquiesced in, & must be the Law on the subject. For all the Law on the subject see 2 Burr. 1099. Pre Ch. 385 Cro C. 415 Mar 426. 5 Burr 2630 3 Wms & Mr. Ex. Ca. 5 Ray 338. 420. 744. Gilb Ev. 126. 7. 2 Str. 762. Com. 548. 3 Plowd. 34. 2 Vent. 152. Carth 471. 1 Salk 29. 2 Vent. 141. Cro C. 163. 381.

Joint creditors or contracts. Stat. limitations.

Section 11 etc.

In a case where one of two joint debtors mentioned in the stat. 4 pays a part of it after the Stat. has run upon it, it was held that it was an acknowledgment of both; and it must be so from the nature of the contract. His right of recovery lies by both, and not of one, but as it is a debt due by one the action lies of both. Whitcomb, assignee of both, 3 T.R. 434. 4 T.R. 819. contra 2 Vent. 350. The cases are all compared & to be reconciled in Esp. N.P. 552. but it is undoubted.

The Stat. of limitations begins to operate from the time the right of recovery commences, not from the time of the promise. In all these Statutes, there is an Exception, in favor of infants, coverts, infants and persons beyond sea. When the Stat. has once begun running, going beyond sea, or marrying, cannot stop it or take the case out of the Statute. If there are joint creditors & one beyond sea, but or, this will not prevent the running of the Statute for one is left, by whom the debt may be levied. As this stat. respects contracts, it has been made a question, whether it affects a Contract, on which indebitatus assumpsit will lie? Where is no doubt but it affects all Contracts. But if the indebit. assumpsit grows out of a wrong or tort, it does not affect it; so where money &c is found. The Stat. does not run? T.R. 56. 562.

On a running account between the parties i.e. where articles are charged on both sides, Indebit. assumpsit. or a general acct. lies at Com. Law. e.g. E.V. J.S. sells T.R. a pair of Oxen, some time after sells him his black mare, sometime after that, sells him his white Cow &c. T.R. sells J.S. a Shoulder of Beef, sells him 3 Sheep — sells him 4 Pigs &c — When we say that the

the Statute runs upon it, we do not mean, that there are not many things more than ___ years old, the time limited, that can not be effected by the Stat. The rule is to apply the payments made in the running account to the oldest items or debts on the other's account, & what it will not absorb is affected by the Statute. This is when the party does not direct to what the payment he has made shall be applied. 6 Cl. R. 139 a 189.

Thus far I have been treating of the Stat. of Limitations as respects Contracts. But there may be Statutes frequently are such limiting the time in which a recovery can be had for Torts, as Trespasses, Slander, &c. Remember that nothing (even a confession) can take Cases out of the Stat. when it has once run upon them. There is a Question growing out of this, which is not often decided. Suppose e.g. you have been in the habit of trading at some distance from home. A Slander in a secret manner been properly circulated - Of this you were ignorant till after the expiration of the time, within which the Stat. says an action for Slander must be brought. You were so much damaged by this false representation that you found it impossible to make bargains as formerly, & was still ignorant of the cause. Can you now (after the expiration of the time) bring an action for the special damages you sustained within the time? The case is a hard one & there can be no Question but you may recover consequential damages for the loss sustained. For Slander but you need not prove any damage - the Law presumes damages. But the Question here is can you bring an action for the special damage which occurs within the time limited by the Stat. after that time has expired? I do not know how it would be.

determined. Courts perhaps would say that the action could not be brought, still I think it would be incorrect.

There are also Statutes of Limitation with respect to entry on Lands. If a person does not enter on his Lands for a certain time given by the Stat. he can bring no action of ejectment to recover them. He may at Com. Law have a writ of right, which is of a higher remedy than an action of ejectment. The non entry on the Land does not (in Eng.) bar the title, but it does bar the right of entry. In Con. whatever bars an entry bars the title. In some of the States they have no writ of right, & if the party cannot recover in an action of Ejectment, he cannot recover in any action. and this is the Law in Penn.

Qu. Under the Stat. it has been a Question whether one disability may be tacked upon another? Suppose a young dy under age marries; and Coverture intervenes, does that (the Stat. does not run when she was a minor) joyn'd an additional disability? Does it prevent the title of Land from vesting in y^e^ person in possession, after the first disability (on account of her minority) is at an end: or may she re-enter? It is the opinion of many eminent Lawyers, that she shall have the benefit of her Coverture as well as of her infancy. Thus tacking two disabilities together. Judge Reeve is of a contrary opinion. Such a case happened in Conn^t^. It was this. A Girl under age married, & some other person at this time had possession of her Lands. She lived about 50 years under Coverture, & on her death the Land descended to a daughter who also, married while a minor. This dau^r^ also lived 40 y^rs^ under Coverture. So that the persons hav-

having the poss. of the Land were laboring under disabilities for more than a Century. After this an action was brot upon the title and the Court decided that the disabilities having been perpetual, the Stat. did not run. Of the same opinion was Judge Robert 30 yrs ago, in argument, that opinion was shaken, in a subsequent case, he was satisfied it was erroneous.

A similar case came before the Supr. Ct. in Mass. and Judge Parsons gave the opinion of the Ct. that the disabilities could not be pleaded. 8 Cas. vol of Mass S. Rep.

All Courts, says S. Kent, have ruled in pleadings the Stat. They plead it in Bar, or what amounts to the same thing. The English mode is, "now against his Supt &c. ann.s" - which amounts to a plea in Bar. This practice has been adopted in most of the States in the Union. I think it is clearly a plea in abatement; it is no plea in Bar in many cases (for a plea in Bar goes to the merits of the action). E.g. In the State of New York they have no Stat of Lim. as respects Bonds. In Conn. we have a Stat limiting the time to 17 yrs. Now suppose a Bond made in N.Y. is sued in Conn. our Stat. shd be pleaded in abatement. If it were pleaded in Bar, it would go to the merits of the case, & according to that you wd say that there shd be no recovery, when it may be recovered in N.Y. if the Defend. shd be found there & sued. It wd be no defence for Defend. when sued in N.Y. to plead the Stat. in Conn. A plea in Bar in one State is a Bar in another, & therefore it shd not be pleaded in Bar, but in abatement. The nature & construction of a Contract must be according to the

Defences to Actions on Contracts. - Stat. Limitations

Law in the place where it was made, but y^e form & mode of proceeding is according to the Law where sued.

It has been a disputed point whether a Stat. limiting the time for bringing a particular action can prevent a recovery in another action for the same cause. For ex. &c. - A. wrongfully took away B's property three years ago. The action of Trespass is barred by the Stat. Can an action of Trover be brought. Where Trover is not mentioned in the Stat. which limits Trespass for the very same thing? Yes. The Stat. will be no bar to an action of Trover - altho it is objected that the Stat was intended to apply to the thing done and not the form of redress. The rule is that you cannot carry the Stat. of Lim. one iota farther than it expressly goes. The Stat. is an infringement of the Common Law, & therefore a Liberal construction is not to be given it. -

Defences to Actions on Contracts.

Of Accord & Satisfaction. By Judge Rowe.

When there is a Contract for money & it is paid, "full payment" is the plea; and when it is to do a collateral act, "performance" is the plea. When an agreement is entered into between the parties to accept something in satisfaction of an injury done by one to the other, or for a debt due from one to the other the plea is "Accord and Satisfaction". "Payment" then is only a plea when the Contract is to pay money. "Performance" is only a plea when the Contract is to do some collateral act. But "Accord & Satisfaction" is the plea when the Contract is to receive a collateral thing in satisfaction of an injury done &c or for a debt due. And an Accord with Satisfaction having all the necessary qualifications to constitute a valid & effectual accord, (which are the same that are necessary in other Contracts) is a good plea in Bar to any actions, whether on Contracts or for Torts, upon the original liability for which the accord was a commutation, except it be to Real & one other set of actions, which I shall presently notice.

Accord is an agreement to receive something else in satisfaction of a Contract besides the thing specified therein. Or in case of a Tort to receive some thing in lieu of uncertain damages incapable to be recovered. It always supposes an agreement, & when satisfaction is made according to the agreement, it is a Bar to any recovery. —

9—

Defences to Actions on Contracts. — Accord and Satisfaction. —

I have said it is a bar to all actions except Debt or one other Act which is an exception viz. If the debt or duty arises wholly from or grows out of a Specialty, a parol accord & satisfaction was at Com. Law no bar to a recovery on the Specialty. As where a man owed 100£ by single Bill (not a Bond with a Condition for the rule is of a Deeds instrument without a Condition) and the obligee received 5 Ton of Iron in satisfaction of the same, it was held to be no Bar to a recovery on the bill. It must be where the debt grows out of the writing it self — it is from the Deed — and the rule does not apply to a Bond with Condition. The reason of the rule is this — It is founded on the old maxim of the Common Law, "Unum quodque ligatur eo ligamine quo ligatur dissolvitur" "A contract can only be discharged by another of as high a nature as itself." In this case the discharge (which is by parol) is of a lower nature than the Contract (which is by Specialty).

But this principle, says Judge Kirby, I consider to be wholly done away by an English Statute: At Com. Law, Payment &c. not be given in Evidence but this Stat. allowing a payment to be given in evidence, all the reason of the rule in case of an accord & satisfaction, ut supra must cease.

I say even Payment at Com. Law &c. not be given in evidence unless there was an instrument in the nature of a discharge or a release or receipt of the same solemnity as the Bond. But the Stat. which allows this applies in all respects to this rule of accord & satisfaction concerning

especially when the debt or duty grows out of the instrument itself. It does not apply to a Bond with Condition.

In some States payment may be given in Evidence. In other States, Statutes have been made including accord and satisfaction. Suppose a man gave a Bond to pay 100£ provided he did not pull down such an old (as eg. to repair a house,) now accord & satisfaction is a good plea to such a Contract, for here the liability does not grow out of the Deed but arises from the non-performance of the act, and may be done away by an accord & satisfaction. This exception, I have now mentioned, extends only to cases where the consideration does not appear: and you could not Demur on it because the instrument on which it was founded was under Seal. 1 Brownl 136. Cro Car. 116. 4 Co. R. 78. 6 Co. R. 44. Cro. Jac. 100. 1 Roll. abr. 266.

When there are two or more Debtors, an accord with one is a good discharge of all, either in Contracts or Torts. You cannot sue them separately and recover a part from one & a part from another. One is liable for the whole & therefore an accord with one is an accord with all. It proceeds on the ground of a complete satisfaction for the injury, if a Tort, & of the specific condition, if a contract.

With respect to an Accord being a Bar to a Real action, it is impossible unless something more appears. No man can obtain a right to real property without a deed. Suppose A. and B. have a dispute about a piece of Land, and agree, in this manner, to settle it; Says A. to B. if you will give me 20£ in satisfaction of my claim, I will relinquish my right. B accepts the offer & pays the money. In personal

actions this would be a satisfaction. But here after yr 20 £ is paid something more is necessary to be done. A should ex cute to B a deed & thus he will have the title. But if he does not B cannot plead accord & satisfaction, for you can plead nothing less than a Deed where the title of Land is concerned. He may to be sure, sue A. & recover back the money. Or if the accord had been reduced to writing Chancy. would compel a performance, but otherwise they cannot as the Stat. of "Frauds & Perjuries" in terms.

The requisites of an Accord.

This accord must have certain qualities to make it good. In the first place it must be in full consideration of the claim = Secondly, it must be certain in its terms, and = Thirdly it must be executed

By being in full satisfaction nothing more is meant than, that there shall be a consideration. An accord to be of any force must have a legal consideration, either a pecuniary benefit accruing to the creditor or a disadvantage to the debtor. If the consideration is ever so small it is in full satisfaction, unless its insufficiency appears on the face of it. As where a man brot his action vs. another for a forcible entry into his House. The Defendant engaged he did so no more, but pleaded that the Pltff ought to be barred of his action, because it was agreed between them that the Pltff might come in again. But this was no satisfaction. If they had agreed that the coming into the house should be in full satisfaction of the Damages it would have been a nudum pactum. But there can be no

enquiry into the consideration, unless it appears on the face of the instrument, that it is insufficient to be in full satisfaction. 3 Plow. Com. 5.

Another case: where one took the Cattle of another wrongfully, & when sued in Trespass he pleaded that the pltff ought to be barred, for the he (the pltff) on being allowed to retake them, accepted them in full satisfaction of the wrong. But is no satisfaction for want of a consideration. 1 Roll. 128.

Another case: where a man entered into a Covenant to repair a House - & he neglected it - and after the breach of the Covenant it was agreed that he sh. go on to repair, & he did so; and when sued for a breach of the Cov. he pleaded that the pltff ought to be barred, for that they agreed that he sh. go on & repair after the expiration of y^e first Covenant - & he had so repaired &c. But this was held to be no consid. for the breach had been committed. 4 Mod 88.

The principle you see, is that there must be a consideration, else it is no satisfaction. In the case I mentioned above in 1 Roll 128. where a man sued another for wrongfully driving away his cattle & he came in & pleaded that the pltff. agreed that if he (the Defft) wd drive y^e cattle to a certain place it sh. be in full satisfaction of the wrong, which agreement he had performed. This plea of accord & satisfaction was good; the driving the cattle to the place pointed out being a sufficient legal consideration. 1 Roll 128.

I observed that a consideration however small, is sufficient satisfaction unless it appears upon the face of the instrument to be insufficient: as, where a man

sued another for 15£ & the D. to it pleaded that the Plff. ought to be barred, for that it was agreed between them that the Defd. should take 5£ in full satisfaction of ye debt. It was not a composition between debtor & creditor, but by way of accord & satisfaction; it was evident that it was not a sufficient consideration, as it was taking a kind of the actual sum due, & therefore it was not a good plea. 1 Stra 426. 5 Bac 117. 1 Leon. 19.

Nothing is a satisfaction unless it is something in the nature of property - of a pecuniary nature - moneys worth - This is a rule, but it is says the Judge without sense or reason. But as the rule is, so I give it. If Stiles cane Nokes, & they afterwards agree if Stiles will ask Nokes's pardon that it shall be in full satisfaction of the injury done; here was a consideration, but it was not an accord & satisfaction which could be pleaded in Bar, for it was worth nothing. But if Stiles had treated him to a glass of grog, it would have been a full satisfaction; there wd then have been a legal consideration.

The accord must also be certain, or else it is void - this is like all other Contracts. As where Landlord & Tenant differed concerning the Lease, & they agreed that the Deft. should leave the House, (without specifying the time when &c.) The Court held this accord not certain enough. I think however, says the Judge, that it was sufficiently certain, & that it was to be presumed he was to leave the house as soon as he conveniently could. Another case where it was agreed that a man should deliver "a quantity" of wheat in satisfaction of a Contract, & the quantity was

not specified. This was not certain enough for no one could say whether he was to deliver one Bushel or one hundred. Another case where it was agreed in satisfaction of a contract that the Deft. shd employ a joiner for the plff for two or three days - it was holden not to be sufficiently certain. But could it not be made certain by the Deft's saying I will employ him 3 days? No - for the maxim of Law is that that which at is uncertain in its creation can never afterwards, by the parties, be made certain. I should say says the Judge, that an agreement to employ 2 or 3 days was an accord thus leaving it at the election of the person to employ 2 or 3 days. But the above maxim will not allow this. Yelv. 125. 4 Mod 88.

And an Accord to be of any effect must be Executed - for if it be executory tho' the debtor according agreement make a tender of the articles agreed to be taken in satisfaction, it will be of no avail without an acceptance. If the creditor refuses to carry an Executory agreement into execution, it will be of no avail to the Deft. An Executory agreement is no Bar. And it is said that no action will lie on this Executory agreement, but I think says the Judge that an action in many cases will lie for the damages occasioned by the disappointment & trouble. But if the agreement is not carried into execution, it will not be a bar to the action. 1 Roll 129. Cro E. 193. 305. 1 Mod 169. 9 Co 79. & 80 is all ye Law. If there is an agreement to do a certain thing in lieu of another, & a suit is brot before the day on which the thing is to be done, the agreement is not a bar to the action, because it is not executed. 1 Roll. 129.

The manner of Pleading an Accord.

The old method of pleading an accord & satisfaction was to spread all the Contract of accord upon the roll & also delivery & gradually to that accord, & an acceptance by the Plff. The modern method is much more concise the effence of it being a delivery in satisfaction, and acception by the Plff in satisfaction. Satisfaction is the gist of the action. Stra 573.—

Defences to Actions on Contracts.

Foreign Attachment. (by Judge Reeve).

But little is to be gathered from the Eng. Authorities, which relates to this branch of our subject. It is recognized by no Law in Eng. either Statute or common. It is by only a Custom of London, & this custom is adopted throughout the different States, in general, in the Union.

It is a remedy calculated to enable a Creditor to compel the Debtor of his Debtor, to pay over the debt to him, in case the immediate debtor lives out of the State, or has absconded so that he cannot by Legal process be compelled to pay the debt. The nature of it is this, to explain it by Example. A. may abscond out of the State, owes B. money, and C. living in the State, may owe A. The object of this foreign attachment is that B may get the money out of C.— B. brings an action, vs. A. & leaves a Copy with C. which attaches the debt due by him to A.

It makes no difference whether the property of A. in the hands of C. be money or goods. Whatever it is this copy attaches it. Now C. must respond the damages settled in the suit of B. vs. A. to the extent of the Debt owed by C. to A.— And if C. pays this B. by judgment of Court, & A. sh. afterwards sue him, it is a bar to A's action. C. pleads that he has paid the debt on a judgment obtained by B. vs. A.— This process is given to enable the Creditor of the absconder to recover his debt, of the debtor of the absconder C. in this case is called the Garnishee.

"Foreign Attachment" is pleaded by stating in their order, the pltf's (As.) indebtedness to him (B) who brought the

attachment — that the writ was returnable to such a Court — that the present Defend. was served with the process — that default was made by present Plff — that judgment was recovered vs him — and that the present Defend. paid the original Plff on said judgment.

After C is served with a foreign attachment the property in his (C's) hands, tho never seen, is attached and he cannot pay it over voluntarily to his Creditor (the Defft. to the suit) (A) but at his peril. If he does he will be compelled to pay it over again — he does it in his own wrong.

If C. should be in another State and A should see him there & recover he would not then be compelled to pay it over again. If A. the Defend. to the foreign attachment having paid the damages himself, brings his action vs his debtor, & he pleads the foreign attachment, payment is a good replication in this last suit; however it is incumbent on the Plff to have given notice of his payment to the Defend. Suppose after B has obtained judgment vs A. he takes out an Execution & demands the payment of it, of C. & C. refuses to pay it, claiming that he owes A. nothing, or that he has none of A's property in his possession or care, what is to be done? — B must take out a writ of Sci. fa. vs him (C.) to shew cause why he does not pay it. — C. is made a Statute Witness, & B has a right to call upon him to come in & swear whether he owes A the amount of the judgment, or what he does owe him, or what property he has of A's in his hands. And altho B does not call him in for fear he will perjure himself & attempts to prove his indebtedness to A by other witnesses (which he has a right to do, yet C. may

come in & swear. and if on his story & all the circumstances together it is found that he is a debtor to A. he must pay the amount of the judgment recovered vs. D. if he owed so much; & if not he must pay to the extent of what he did owe, which is found by the jury.

The oath is not conclusive - it may from other testimony or circumstances be found vs. him & adjudged he is not guilty of perjury by swearing. If he will not come in & (?) testify when summoned, judgment will be rendered vs him as for his own debt for the whole sum, sub silentio.

The plea in this case is, never agent, atty, trustee, debtor &c (as the case may be) nor has he any property of the absconding debtor in his possession. And upon this plea the Jury find whether the fact is so or not.

By the Stat. if the absconding debtor be not in the State, & no agent or atty. appears to defend in the suit on the original process, the cause shall be continued to the next Term, & then if necessary to the Term after, when without a special cause alleged and allowed in Bar or abatement it shall come to trial. This provision it was found opened the door for a singular kind of fraud. A. the absconding debtor having left the State, & to avoid being compelled by the creditors of A. to pay the debts or give up the effects induces D. his friend (by promising to pay all the costs of the suit &c.) to factorize him in a suit vs. A. tho A. was never his (D's) debtor. The Garnishee of course being careful not to appear on the return of the writ, the absconding Debtor being out of the State, the cause was continued from term to term, & the property holden in this

fictitious suit, while the real Creditors were deprived of their claims. In order to prevent cases of this kind a Stat. was enacted, that in such case the suit should be considered a vexatious one & the party shd be liable to double Damages.

If the debt from C. to A. is not due, but becomes due some time hence, say 3 yrs, still this does not prohibit B. from suing him, but B. can't have a sci. fa. till the expiration of the time.

If C's contract was to deliver A a collateral article, as e.g. 100 ℔ worth of Shoes, & B. has a judg.t vs. A. C. must turn out the Shoes, & is not obliged to pay the money tho B. requests it. B. may levy his Execn. on them & sell them at the Post, & the amount they sell for goes so far towards payment of the debt.

If there has been an Execn. in favor of A vs. C. and B. recovers judgment vs. A. now if C. is compelled to pay the amount of A's debt on the Execution in favor of A to the Sh.ff. he cannot be compelled to pay it over again on B's execution. Suppose in this case C. pays the money into the hands of the Sh.ff by compulsion, can B. by leaving a copy with the Sh.ff. have a lien upon the money in the hands of the Sh.ff. when he (B.) has his judgment vs A.? I think says the Judge that he can. The reason in this case why C. is not liable to pay it over again to B. is, because, the payment of A's Execution is not a voluntary one, but he was compelled to do so by process of Law.

Foreign Attachment relates only to cases of property in debt due. No person can make a claim of this kind for

a tort he has suffered. If A beats B. absconds & leaves C. his Debtor, B. sues C by leaving a Copy with C. attaching debt due by him to satisfy him for the injury he has suffered.

The Garnishee (C.) must be a Debtor or have property in his hands. and whatever C. pays to B. (who has obtained a judgment vs. A.) without putting B. to the trouble of taking out a Sci. fa. will be allowed him; as if he is sued by A. he may give it in Evidence & it will be a bar. If C. will not pay & B. is obliged to sue out a Sci. fa. and thus recovers his debt out of C. he (C.) will be obliged to pay this additional Cost out of his own pocket. There may be some contention, the property being in the hands of the Garnishee, for B. a Creditor & D. another Creditor may both sue. & the absconding Debtor thus having two Writs of foreign attachment out both obtain judgment - & the Garnishee will not know what to do - he does not know who obtained judgment first - he cannot pay the amount to the absconding debtor, he must pay to B. or D. & it is immaterial to him which one of the judgments may be bad for error. - Our State has made provision for this. We have permitted both suits to be tried at the same time & then the C. may say the Garnishee shall pay that person he must pay. By this means the Garnishee is saved of any trouble or expense as the parties must pay the Cost themselves.

Defences to Actions on Contracts.

Composition with Creditors. This is different from Accord & Satisfaction. Where the Creditors have subscribed & agreed to take what they must together, they will be bound by it. & if proved it is bar to any suit brought. It differs from an Accord and Satisfaction, which concerns only a single transaction; whereas this comprehends all debts.

With respect to **Illegal Contracts** if the illegality appears on the face of the Contract, it being by parol, you must demur; if the Contract is by Specialty you must plead the illegality specially. In a plea of Usury, you must state in your plea, that there was a corrupt agreement between the Pltf & Defd. that the Defd. should give to the Pltf a certain sum more than Legal interest. If the plea does not state that there was an agreement, it may be demurred to. You must state it to be corrupt. Stating an agreement merely, without saying Corrupt is not good. It may be there was an agreement to take more than Legal interest, & yet not be illegal, as where Lay and is run. The Law requires that there shd be a certain sum put in, but I can see no reason for it tho the Courts have so decided. E.g. If he states that the Pltf took 12 p. Cent, and it is proved he took 7 p. Cent Int. now the plea will be good, for this is more than Legal interest; or if it is proved the Pltf took any more than Legal interest it will be good. The plea states that there was a corrupt agreement: the Question arises whether there exists a

an usurious Contract of which the Defdt was ignorant at the time it was made? A man may sign a Note for more than legal interest, but is usurious & therefore corrupt? The C. of Errors said it would not be a corrupt agreement & c. not be usury. They said it took two to make an agreement. I was never satisfied with the decision. The Law with respect to usury does not mean that there should be 2 parties. There must be a Contract, & this requires 2 persons, but one of them I think may make that Contract corrupt. Formerly any thing was usury which grew out of money, but now, usury means taking something more than the Law allows for the use of money. and if a man takes more than the Law allows whether the Defdt knew it or not, I contend it is usurious. 3 Day 268. There is very little Law to be found on this subject, because neither the Statutes nor English Law Books contemplate a case of this kind.

Another defence is a former judgment in an Action for the same cause, matter or thing.

If the Plff has once recovered final judgment he cannot sue the Defdt again for the same thing. If he has Cost his case he may take out a Writ of Error, but that is not the Question here. There are different forms of action relating to the same thing. as Trover & Trespass are concurrent in many cases. Suppose then the Plff has recovered in Trover can he bring Trespass for the same thing? No. he cannot. The Question then arises

what actions are concurrent? The Rule to determine this is, will the same proof support the two actions? When the same evidence must be brought to support the second action, that was brot up in the first when judgment was recovered, the first judgment is a bar to the second action. But there is an Exception to this rule. A recovery in one action of Ejectment is no bar to another action of Ejectment for the same Lands. The parties are not the same Esp. 37. 3 East 344.

Payment.

Another defence is Payment - and it is a plea in Bar. Not much is to be said of this.. The Defe. pleads that the Plff. ought to be barred for the note &c. i.e. the Debt is discharged by payment. Where there is no Stat. of Limitations, he may give Length of time in Evidence to raise a presumption that the debt is paid. As for Example. The obligor was a wealthy man, the obligee was Lad always Low poor & frequently Lad borrow money of the obligor. The obligee died and a Bond was found among his papers by his Exec. who calls upon the obligor for payment. The obligor has no entry of it in his Books, but says he must have paid it, tho' he has no remembrance of it. The Bond not being barred by the Stat. of Limitations, the Exec. as it is his duty brot an action upon it vs the obligor. The Exec. requested the obligor to testify & he was admitted. He swore to all the foregoing facts - and the Jury found full payment. So was presumed from the relation & situation of the parties

as the obligor being rich & the obligee poor &c that the Bond had been paid.. well sometime after the obligor found the receipt, stating on the face of it that the Bond was lost, & the full payment of it.

Yet this presumption of being paid from the length of time may be rebutted, as by proving absence, or the obligors not having the means to pay, or by shewing that the plff had frequently called upon him for paymt &c not obtain it. or that he had sued him several times & had withdrawn the suits or promise of payment &c any of these will rebut the presumption.

With respect to a collateral act to be done, performance is the plea. If the thing to be done is one upon which it apparent a Question of Law will arise, the Defr ought to state how he performed, that the Court may judge of it.. but if it is merely a matter of fact, he may plead that the plff ought to be barred because he has performed the Contract, without shewing quomodo. If a man had contracted to obtain a release, he cannot plead more performance, but he must state quo modo, as it is apparent a Question of Law will arise upon it & the Ct will have to determine whether it was good or not. So when a man is to give a Deed he cannot say merely he did give a Deed - he must state quo modo (as on the case of a release).. Secus when the thing to be performed is a matter of fact..

Defences to Actions on Contracts. Discharge & Release.

Another Defence is a Discharge. A discharge in its technical sense is where no right of action has accrued. A bargain having been entered, but given up, as we say. A Discharge is different from a release. A release is a discharge after a right of Recovery has accrued. Discharge & Release are sometimes used by many loosely, but they are not so. A release is not good without some consideration - it is of no avail & cannot be made use of as a defence. Yet a trifling consideration as a mug of flip is sufficient. But a discharge (before a right of action has accrued) is good without consideration. A discharge will only apply to those cases where a right of action has not yet accrued. Vide as to a Release. Cro C. 384. 1 Sid 177. 2 Keb 293. 2 Mod 44. 1 Vent 205.

Another Defence is a Release. A release (ut supra) is after a right of action has accrued. Any instrument in writing detailing a consideration is a release. But if it is sealed it is good without any other consideration than that which grows out of the instrument - the seal is a sufficient consideration. A release applies to what ever is specified in it. If it is a release of all actions it includes all, but if it be of one action, it includes that one only. We cannot infer a release of any duty unless mentioned. But a release of "all claims & demands" is a broad release, it includes & discharges not only all debts already due, but also debts to be solved in future, as a Bond payable a year hence. A release all actions or Contracts or for torts, or any duties in praesenti, solvendum in futuro. Co Lit 291. Cro Jac. 300. 487. Cro E. 606.

But a release of all demands, does not apply to cases

that are not Debitum in præsenti solvendum in future, but which grows out of a Contract then in Existence. As where a man took a Lease, & was to repair &c & during the existence of the Lease he got a release of all demands. It was not a release of the Contract to pay & repair. The rule then is, that by such general release of "all demands" a debt not yet accrued is not discharged. Therefore a Covenantor by such release wd not be discharged from his liability for a subsequent breach of his Covenant. A release of "all Covenants" would release it & nothing else. Neither is one discharged from growing rent by such general release, unless indeed the rent is reduced to a chose in action, or where it is not payable as Rent, but reduced to the Common form of debt, in which case such a release would release the debtor. Nor would such general release of all demands, release what accrues yearly as an annuity. A release of all Covenants wd be a discharge of them. Auth. ante. also 1 Lid 141. 1 Salk 578. Co Lit 289. 292. 232. 6 Co 170.

No collateral Covt to be performed afterwards wd be released, by such genl release of all demands &c. By collateral I mean a Covt to pay something else than money. Neither are contingent obligations discharged by a release of all demands, but after this contingency has happened, by wch debt is ascertained, it will be released by such general release as well as any other debt. 6 Co 170.

A Covenant to do something in future is not released by such general words, but it would be by a Release of all Covenants. Co Lit. 292. A release to one of several joint Obligors is a release to all. 6 Co Lit 232. 2 Ray 690. 1 Salk 574.

Courts will however confine the meaning & operation of these expressions to a narrower compass than they would import, but in all these cases there must be something between the parties which warrants it. When the particular words of a release seem to include all dues whatever, yet if the Court can gather from the whole face of the release or from extrinsic circumstances that the purport of the release was not so general, they will restrain it to those dues contemplated by the parties. As if A has a Bond vs. B. & assigns it to C. & B pays the interest annually to C. and afterwards A. executes to B. a release of all dues C. calls upon B. not for the interest & B. says the Bond is in the name of A. & I have a release of all demands, & shews it to C.. Now is this Bond released? It appears to be, from the terms of the release, but the Courts say no. They say it was not in the contemplation of the parties at the time, that this Bond shd be released. The Ct. restrain the words "all demands" & Equity points out the rule.. Another Case. J. S. had a demand vs. T. N. for £100- both of them died- the T. N. did first & in his will left J. S a Legacy of £5. at the same time you will observe N. owed J. S £100 &. J. S. dies and the Exec. of T. N. paid the Exec. of J. S. the Legacy of £5. & took a Receipt from him (the Exec. of J. S.) in full of "all demands." The Court said taking into consideration all the circumstances, they will restrain it to the subject matter, & let it apply only as a release of all Legacies & not of the £100 debt. 1 Pow. C. 377. 392. 398 & cases there cited. Cath. 119. 2 H. Bl. 577. 2 Ld. Ray. 1235. 236. 664. 2 Ld. Ray. 205.

Defences to Actions on Contracts.

Bankruptcy or Insolvency.

This is another good plea. These Acts of Bankruptcy or Insolvency (being the same) apply to those debts only which are due at the time of the Bankruptcy. If a man contracts to do a thing which is not due, owing at the time of the commission it is not barred. Debts if due at the time, in such case if he does not bring it in it is barred forever. A discharge of one Bankrupt partner is not a discharge of another who is solvent. 7 T.R. 703. 4 Ves. 94. 1 Wils. 248.

It is debts & contracts only that are discharged under an act of Insolvency. It does not discharge torts. If A beats B. & then becomes insolvent & is discharged from his Debts under a commission of Insolvency, still he is not discharged from his liability to B. for the Tort.

An Insolvent act in one State is no bar to the demands of Citizens of another State. The States consider it so. If the Contract is made to be performed in the same State, then a discharge under a commission of Bankruptcy in the same State is a good plea to an action on the Contract. But if the contract was made in one State to be performed there & the obligor was also wholly discharged from the Contract by a general commission of Bankruptcy obtained in another State, & he returns to his original State, this discharge is no plea to an action on the Contract. So that a discharge under such commission is only a discharge of such Contracts as were made to be performed in the State.

where the commission issues. The Constitution of the United States says "full faith & credit shall be given to in each State to the Public acts. Records & Judicial proceedings of every other State" but that has nothing to do here; for the discharge of an insolvent Debtor in one State will avail him in another State only as to those debts contracted in the State where the discharge was given, & not as to debts contracted in any other State.

The law of y^e place where contract was made must regulate the dissolution as well as the creation & construction of the contract. In the case of Sewall vs Russell decided Nov. Term 1812 in Philadelphia, Judge Rush's words were these. "The Question before the Court is whether a Debt contracted in Penn^a, both parties residing there at the time, is extinguished by a subsequent discharge of the Debtor under the insolvent Laws of N. York? We are clearly of opinion that it is not. The general rule is that the Lex Loci regulates the creation, the construction & the dissolution of Contracts. And we cannot see any reason why the present case should form an Exception to the rule. It is very obvious that a contrary decision would be productive of the most serious Consequences & the most palpable injustice to Creditors. The whole proceedings being in another State the Creditors in Penn^a have no notice given them of the Debtors application for the benefit of the Law. No opportunity afforded them of opposing his discharge on the ground of fraud, or the concealment of property. If a discharge in N.Y. were held

(7)

to be a Bar to debts contracted in Penn.a a man has only to get in Debt here, conceal his property on the Lands of a Friend & go to N.Y. and after remaining there three months take the benefit of their insolvent Laws, without any notice to his Creditors in Penn.a & then return here & take possession of his property & put his Creditors to defiance. To give the discharge an extraterritorial construction wd be to open a door for fraud & injustice & this the Law will never sanction. Independent of all the authorities that have been cited, it appears to the Court that the case of Ewart vs. Coulthard as stated by Ch. J. Kent in 3 Cains 154 is full in point for the present case. In that case the Defend. had been discharged under the insolvent Laws of Penn.a & it was held to be no bar to the recovery of a Debt contracted in N. York previous to his discharge in Penn.a — In short both the Law & the justice of the case are vs. the Defend. and the Court are of opinion that the rule (on the Plff. to shew cause why the Execution sh.d not be set aside) must be discharged." Dem. Democratic Press, Dec. 2. 1812. vol. 50. — Authorities cited Contra the Judge. Cooper B. L. 373. Cooks 13. L. 60. 115. 347. 2 Ves. 738. 1 Ath.s 119. 1 Bro Cas. in Ch. 376. 1 Dallas 228. 2. 94. 2 Id. 100. 3 Binny 201. Ath.s by the other side — 3 Cains 154. 2 Johnson 235. 3 Binny 201. 3 Dallas 369. Williams 198. Mass. R.

Defences to Actions on Contracts.

Arbitrament & Award. By Judge Reeve.

Lectures 7. Nov. 30. 1812.

The Law upon this subject has undergone a great alteration. The Modern decisions are very different from ye former cases. In treating of this subject. I shall point out what is not as well as what is Law. The different rules grew out of three different practices. —

In the first decisions the courts were very much averse to awards & did not wish to establish them. They set them aside on very nice technical grounds. They looked into them with Eagle eyes, & if they could conceive from any circumstance that the award was not good they set it aside.

Afterwards Cts went over to ye opposite extreme, and wished to establish every award. If they Cs conceive any circumstance attending the case which wd uphold the award, they availed themselves of it & said the award was good. and in this way often established bad awards.

But deserting both these extremes the Cts now determine awards upon the grounds of strict right. They do not look with eagle eyes into the awards or conceive any thing which will affect it either way. If it appears good they establish it: if bad they set it aside. They regulate their decision by Justice & common sense. They understand & construe awards as men of common sense wd do. This has given rise to a great difference of opinion upon the Law upon the subject. I shall mention what now is, what now is not Law. I will give the old Rules & ye new ones now in force, without taking notice of the middle grounds, which adopted.

Defences to Actions on Contracts. Arbitram^t & Award.

An Award is y^e judgment of persons appointed by the parties to decide the controversy between them. These persons so appointed are called "Arbitrators". If the award has all the qualities of, or requisites to a legal award, it is a bar to any action founded on the original liability, & may be so pleaded. No action can be maintained on the original cause of action, it must be on the award. The award is in lieu of the right founded on the former liability. It is a bar to all actions whether for contracts or torts, except indeed, where the liability arose from specialty contracts & where the title to land is concerned. But in all other cases when the original liability or matter in dispute is arbitrable the award may be pleaded in Bar.

No matter what the subject of the award is, for upon the supposition of its being a good one, it may be pleaded in Bar, & comes in lieu of the old contract. With respect to this question the old rule was, that if it was to be performed in a certain time, & was performed it w^d be a bar to an action on y^e original controversy or liability. But it was otherwise if it was not performed in the time limited. In such case the party might resort to the action on the original liability. But this is not so now. The award creates a new duty, & to it the party must resort for satisfaction.

What may be submitted by y^e mode & effects of submission.

When there is a dispute about real property, an award is not a bar to a suit on the original controversy; not but it is arbitrable, but the rule is founded on the nature &

real property. E.g. Suppose P. & D. to have a controversy, as to their titles, about Blackacre and leave it to A. B. and C. Arbitrators, and they award in favor of P. Now this gives P. no title, & will be no bar to a suit brot. afterwards by D. It is wholly negative, & even if they had awarded that the land belonged to P. and that D. shd. give him a Deed. Plain Deed - it wd. have been useless. He in any refuse & he cannot be compelled to give the Deed. They had a practice in Eng. of making out the Deeds before hand, & giving them in to the hands of the Arbitrators, to be delivered over by them to the person who in their judgment owned the land. But this cannot be done in any Country where this maxim exists (viz) "That you cannot create an Estate in Real prop'y. in presenti to commence in future". The Arbitrators hold the deeds given into their hands, as an Escrow, and the delivery of the arbitrators is not a delivery of him who, in their opinion, does not own the Land.

In some of the States the maxim is abolished by Statute, & in others, (as Conn.) it is impliedly abolished. When this is the case, Real property may be conveyed by judgment of Arbitrators, when the Deeds are thus executed & by the parties delivered into the hands of the arbitrators, to be by them delivered over to the person in whose favor the award shall be: and the person to whom the Deed is delivered obtains a complete title by having the Deed recorded. In the Eng. Law it is not because the subject is not arbitrable, but on account of the above maxim that an award of real property is not good.

(D) Defences to Actions on Contracts. Arbitram^t & Award.

Suppose in this case of Real property a Bond is given by each party to abide the award & one of them refuses to abide, in such case the bond is forfeited. So you see both real & personal disputes are in their nature arbitrable.

Public Offences - crimes (because the Law requires their punishment) & matrimonial causes, as divorces, (because marriages ought to be free) are not arbitrable. They must take the course of the Law. But the civil injury which may accompany the offence, & also the liability arising from Contracts to marry, or marriage settlement contracts may be submitted to arbitration.

The State & Character of a person is not arbitrable. as Questions of Sanity, of Non-entity, of Legitimacy. (Questions depending on the Sanity & Normancy of y^e parties, it is to be hoped will never arise within the U. S. J. T.) The award in the above cases can determine nothing, for it is wholly void.

Suppose a common controversy between A & B. is submitted, & y^e award of arbitrators is in favor of A. vs. B. for 20 £. Here there is a debt created by the award, on which an action of Debt may be brought; & the award is conclusive evidence of the debt. So if a bond is given to abide the award, & the party vs. whom the award is refuses, the Bond is forfeited.

Suppose it is not the payment of money which is awarded, but a collateral act. Now they can grant a specific remedy, going in many cases even beyond the powers of Chancery. Chancery decrees a specific performance only in cases of real property as a general rule.

They may to be sure in some cases interfere where a specific remedy cannot be had at Law, as to decree a restitution of family pictures which are wrongfully taken away. But in general they will not decree a specific performance in case of personal property, but leave the party to his remedy at Law.

But Arbitrators decree a specific performance and their award is conclusive of the right; and for this purpose many things are submitted to arbitrament.

So arbitrators may award in case of a dispute of right. As, e.g. A & B. have a dispute about a stream of water, as which of them shall have the benefit of it for their Mills. This may be left to Arbitrators & they may award that the right belongs to one or ye other. Suppose they award that it belongs to A's mill. Now how is the award to be carried into Execution? It never can be carried into Execution in this way; but only make it a rule of Court, & then the award when brought into Court shews whose the right is & they may decree a specific performance. The award is conclusive of the right. Suppose the Arbitrators award that a man do a collateral act, as that he shall build 10 rods of fence, for 5 rods is had injured. The man refuses to do it. The arbitrators cannot award Execution, but an action on the case may be brought ags.t him for not abiding the Award. Or if a Bond is given it is forfeited, & thus the money will be eventually recovered. So that you see in one way or in another, Arbitrators may award in cases of both real & personal property; and in either

case if a Bond is given to abide by the award if the party refuses to abide it is forfeited. When money is awarded the action of Debt may be brought on the award; there is no need of a Bond then. When the award is for the specific delivery of a collateral article, if the refuses to deliver the action of Trover will lie, for the right is absolutely vested by the award. No Bond is supposed to be given.

It has become a Moot point whether when Arbitrators award that property shall be returned, Trover can be brought vs. the person if he refuses to return it? This supposes a Bond given, for there is no dispute but it lies where no Bond is given. The Question then is, must not the party resort to his Bond, instead of bringing Trover. The objection to his bringing Trover is, that he is resorting to the original cause of action. But the Judge thinks it is not so. Whether the party had a former right or not, the award of the Arbitrators has given him the property, & the former right is out of the Question. The rule is the same, I think whether a Bond is given or not; he may bring Trover or refuse. But still the party is at liberty to resort to an action on his Bond if he pleases.

Arbitrators are governed by the terms of the submission. If they are by the submission to decide according to Law only, they must so decide. But they have no right to decide a case contrary to the laws of the land. If it can be proved that the award was made in any respect contrary to the laws of the land it may be set aside. It is oftentimes difficult to decide that the award is contrary to law. If they should undertake to

to determine that a contract entered into on an illegal consideration is a good one, the award may be set aside. So if it appears evident or can be proved to be erroneous it may be set aside.

They as Arbitrators have all the rights & powers of a Court of Chancery as to calling in Witnesses & obtaining Testimony, & even more, for they may sift out of the parties themselves unless they are restrained by the submission. Chancery have no power to compel a party to testify for or agt. himself. Arbitrators have.

Various modes of enforcing Awards.

A submission is either by the Agreement of the parties solely; or it is made a rule of Court by agreement of the parties. And tho' a submission by agreement of the parties may be by parol with a promise to abide the award or by parol promise before the Arbitrators, and in case either party does not abide the award he is liable on the Assumpsit. This remedy is over & above the Assumpsit implied by the submission to abide. But the Assumpsit being liable to be disputed, the parties very frequently reduced it to writing & seal & then when one party will not abide an action lay on the Covenant. Both these modes have now gone out of use.

The common mode now is for the parties to execute bonds to each other delivering them to the Arbitrators, with a condition that if the award is not performed by such a time, the bond shall be forfeited. These bonds are in the nature of Escrows in the Arbitrators

hands & the non performance of the condition of the bond works a forfeiture of it. The Arbitrators then deliver this Bond to the party abiding the award, who may have his remedy upon it: tho he may stick if he pleases not to the award & recover upon that. This is the common mode in Eng.d & some of the States. In Con. & some of the other States it is usual, instead of Bonds, for the parties mutually to execute promissory Notes in favor of each other & deliver them to the arbitrators, who will deliver the Note of him vs. whom the award is made to him in whose favor it is made. If they do not award the amount of ye note they endorse the amount of the Note over & above the award, so as to make it square with the award & then the party to whom it is delivered may recover that sum.

If the Notes are conditional, they are regulated like conditional Bonds. There is a practice in some of the States which was formerly practised in Conn. (not to be found in the English books). It is this. That instead of giving Notes the parties go before a magistrate of competent jurisdiction, mutually confess judgment & put them into the hands of the arbitrators (and as much as they award is due, so much of the judgment they give up to the party in whose favor the award is & destroy the rest, as by endorsing it: and upon this judgment so delivered up, the party may get out Execution. Now why is not this a good practice? The difficulty is here, every award is not a good one. Here is an Execution issued vs. him & the award is illegal perhaps. An

Award may be illegal for many causes, as the Arbitrators may have been bribed &c. Now had there been any a Note on Com: given, he might have come in & pleaded any thing which wd shew that the aw: was not a good one. But in this case, what can he do? The only way of getting rid of ye Execution is to take out an Audita Querela. This Question came up for decision in the Q. of Com: & the evil was so apparent that the Court determined the mode illegal. The Question was again raised & determined the same way in the Inferior Court, & on an appeal to ye Court of Errors ye decision was affirmed. And Judge Reeve thinks the decision was correct, & that other States when the practice exists wd so decide were the Question to be raised). Curtis v. Caswell 1 Root 227. 2 Ed. 4.

Submission is an agreement of the parties to leave ye controversy to Arbitrators, & this may be in writing or by parol. The Arbitrators do not sometimes decide, & the Submission may be conditioned that an umpire in such case shall be appointed. Sum: adds that the submission may be by the parties, by parol before Court, or by writing in Court. (When made a rule of Court it must be in writing). Shews their powers, the consequences of submission out of Court. Dwight, in the second place consider the case where the submission is made a rule of Court. This may be where the action was pending before the Court or where no action upon the controversy has been commenced; for in either case on an agreement of ye parties the Ct. will make the submission. But what is the difference between a submis-

by rule of Court & otherwise? Answer, the interposition of a Court is to give an additional remedy. If the party refuse to abide by the award after a submission by rule of Ct. it is a Contempt of Ct. If he does not appear before the Ct. a Writ of attachment issues vs. him, for a contempt, & on his appearing, if he shews no good reason for not abiding by the award the Ct. may imprison him; & this imprisonment is merely an additional remedy which the Eng. Law gives when the submission has been by rule of Ct. If a Bond however is given to perform a submission by rule of Court, the party is not precluded from his remedy on that - he may sue upon it, the rule of Ct. being only an additional remedy.

In Com. by a Stat. where the award is in damages the Court will issue an Execution thereon, therefore it is not necessary to resort to the Writ of attachment, for a contempt, & the right of imprisonment. If the awd is to do a collateral act, the Court cannot issue an Execution to compel a specific performance, & if one party in such case does not abide by award when the submission is by rule of Court, he is attached for contempt.

When a submission is by rule of Ct. it may be according to any of ye methods already mentioned of submission by the agreement of ye parties solely. And on the award all ye remedies lie which wd lie, supposing an award on a submission by sole agreement of ye parties, as well as that of imprisonment or issue of execution, but it is always to be understood that taking one remedy bars a recourse to any other. Suppose in the English principles

Defences to Actions on Contracts. - Arbitrament & Award.

And B. disputes about such things as are referred to Arbitrators & they make out an award in favour of A. We have already seen that this will not be good that no title is thereby given. But if the party who agrees to the award ought to make a conveyance & does not do it he shall be liable in damages, whether his promise to abide the award be express or implied, by parol or in writing; or if Bonds were given the party not abiding the award forfeits his bond. So that the whole of it is this. if a title is not given by the award, methods may be taken by which it is carried into execution. -

The first Stat. in Eng. was made long after the emigration of our Ancestors to this Country. It is the Stat. 9 & 10 Will. 3. So that there is no common law upon the subject. And if there is no Stat. in your States there can be no suit in Court like the above. This Stat. 9 & 10 Wm. 3. is copied in almost every State with some few alterations & additions, though here in Conn. we have no use for such a Stat. as our Courts ignore the action on the award.

Where there is a submission by parol, no bond being entered into & no rule of Court, nothing in the case but the submission & on this the Arbitrators decide in all such cases where money is awarded the party may have an action of debt to recover it. But if they awarded a collateral act to be done, then as by the old law it was necessary, whether there was a consideration or not. & then was the Ct decided there must be a recovery if there was a consideration with in

express promise, i.e. a promise to abide in consideration of something paid, as a Bond of punct. The submission or the award upon it would support an action. The Law is now the same in all these cases, whether there is a consideration or not. Now he is obliged to perform y^e award whether any consideration appears or not except that arising out of y^e award, and if he refuses in action lies against him. So we see a complete revolution of the Law upon this subject has taken place. Vide on Awds 7. 90. 2. Roll. R. 248. 12. 2. 960. 965. 1039. 3 Mod 35. 1 Sa Ch 76.

You are not to understand when bonds are given to abide an award that the party must resort to y^e Bond cannot sue on y^e award. In case of a Bond being given in settlement of a Book Debt, the Debt is merged in the Bond, but in this case the bond does not merge the award. If the party sues on the award he cannot sue on the Bond. The Bond in this case is an additional security only. This bond may be given to any person else than the person entitled to it as Trustee for him, as if he is a minor. And a third person may give Bond for him & will be bound by it.

The submission & promise to abide are frequently in writing, or the submission only is in writing. But these cases depend on equally the same footing as parol submissions, tho the evidence of a written submission may be more plain & convenient than a parol one. Sid 155. Salm. 104. 112. Barnes Notes 56.

This award may be by parol. When the submission is in writing unless the parties direct it to be in writing. The terms of y^e submission must govern the award. The

extent of the submission is just as the parties choose. They may provide that the award shall be in writing under seal, or in any other way; their instructions the Arbitrators must follow, by deriving all their powers from the submission & instructions of the parties: and if such as it appears Nonsensical & trifling, as when the terms of submission were, that the award should be made out on Gilt paper. This provision was considered frivolous and the award held good tho' not made out on Gilt paper. The parties may submit as many or as few disputes as they please. The time is to be fixed by the parties, the Arbitrators may perform their functions at any time before the expiration of that fixed by the parties.

Revocation. As all the powers of Arbitrators are derived from the submission of the parties, those powers may by the parties be revoked. And it is generally true that either party may revoke at any period of the controversy provided the award be not published. But Judge Clare supposes there could be no revocation after the award was made up, tho' not published, if the party knew how it was determined, as if he had overheard them by listening at the door. This question however has never been decided. Reason seems to say, for if a man has found how a jury will give in their Verdict, he cannot by paying the costs withdraw the suit, tho' had he been ignorant he could have withdrawn at the last moment. Kid. on awds. 16. 18 24. Judge is of opinion that the Law ought to be the same in this case, & that no revocation should be suffered.

On a revocation the Arbitrators can proceed no further, this power being thereby at an end. When one of the parties to a submission consists of more than one person, all the persons who compose that party must join or no revocation can be made.

Suppose one party revokes after Costs have accrued what can be done? There are no decisions on this point but Judge Story has no doubt but an action on the case would lie to recover all the damages sustained. Had the submission been by Bond the party revoking in such case forfeits his bond. The Courts of Chancery will decree down the bond to the real damages sustained.

It has been Questioned whether there can be a revocation where a submission is made a rule of Court. Judge Story supposes a submission of this kind as irrevocable as any other, tho' the party revoking may subject himself to imprisonment, it being a contempt of Ct. & therefore no one has yet been hardy enough to make a revocation in that kind of submission.

The old rule on this subject was that if there was a Bond given there could be no revocation, but as the Courts now stand it may be revoked, but the Bond is forfeited. There is such a thing as a breach of the Condition and a revocation, as if the party will not attend before the Arbitrators, they may prove it & thus, but it will not answer a very good purpose in most any cases, as it may be impossible for the party attending to make out his case, without his antagonist's assistance, & he may with to call on his conscience, or he may want proper

which are in his adversarys possession. Here would be a breach of the Bond & if it were by a rule of Court, it would be a contempt. 8 Co 82. Brownl. 1st part. 62. 2d part. 190.

When the submission is in writing the revocation must be in writing. Here also the party revoking will be liable to an action on the case. If a Bond be given it will be forfeited, but it may be shewn upon oyer, as ante. 1 Sid 281. Ryd. 18.

Where a submission is by parol, the revocation may also be by parol, & the old rule was that on such submission & revocation, no action could be supported; a submission by parol being a nudum pactum; but late opinions are contrary & the rule is not so now. There may be a recovery on the assumpsit. This rule supposes no bond given. 7 T. R. 93. 8 T. R. 3 Jon 87.

It often happens that the parties (this rule applies commonly in case of Partners) enter into an agreement that if any controversy happens between them it shall be submitted to Arbitrators. It has been a question as whether such an agreement was a bar to a suit in a Court of Law. But it is now settled that altho' they may be liable on his contract, yet it is a plea to an action, for such a rule would oust the Court of their jurisdiction which cannot be done. 8 T. R. 129. 1 Wils. 129. 2 Atk 569. 2 Bro C. Ch. 336. 2 H. Bl. 606.

It may be laid down as a general rule, that whenever the controversy is concerning a personal right, whether arising from contract or from tort, as where there is a breach of Contract, a trespass upon one

Land or a battery upon ones person it is arbitrable & the award may be pleaded in Bar to any action founded on that original personal right, in the single case of Infancy I have mentioned of an award concerning a Specialty debt, & from the foregoing propositions, this conclusion may be drawn, which is also recognized in the Books" that wherever an Accord & Satisfaction would be there also an award is a good plea in Bar to the action. Doct. & Stud. Dial. 1. 1812.

Who may & who may not submit.

All persons incapable of entering into Contracts, are incapable of submitting their arbitrable controversies to arbitration. It is settled therefore that a Minor not being capable of entering into contracts is not bound by his submission; and for the same reason a married woman not being bound by her contracts, is not bound by her submission.

If a third person gives a Bond that on a submission by an infant, he (the infant) shall abide the award, the third person is bound by his bond which is forfeited if the infant does not abide. The old rule was otherwise. The Courts were then disposed to set aside every award, if said the Minors own bond was void, & that this bond given for him, was also void. But this reasoning is contrary to principle; for if a Father for instance should give a Bond for the good behaviour &c of an apprentice, his son, he would be bound by it, tho' the Sons bond would be void if he were a Minor. So there was no reason for the rule. 1 Salk 207. 2 Salk 207. 3 Lev. 17. 27. Rid. 23. Comb. 318.

Defences to Actions on Contracts. Arbitrament & Award.

Formerly if an Exect. made a submission of any controversy concerning the property of his Testator, over which he had no power, it was void. But as the Law now stands such submission is good & the Exect. will be bound by the award. But by the English Law it is dangerous for the Exect. to make such submission, for if the award is for a less sum than he could have obtained at Law, or is for a greater sum than he could have been compelled by Law to pay, he must make up the deficiency or pay the surplus out of his own pocket. But in Con. the Exect. may shield himself from such liability by making the submission with the advice & consent of a Judge of the Orphans. But where if he submits without the Judges advice & consent he is liable as in the English Law. 1 Ves. 691. 12 Mod. 216.

It is said in the Elementary Writers that the Assignees of a Bankrupt may submit to arbitrament & not be liable for any Costs &c. (1 Atk. supra) But Judge N. says that he can find no such Common Law & thinks it incorrect. By the English Stat. there is a provision made that the Assignees of a Bankrupt may submit any dispute concerning the Bankrupts Estate; but when there is no such Stat. the Judge thinks the rule as laid down in the Elementary Writers will not obtain. Kirby 203.

It has been Question whether one partner can by a submission of their joint affairs bind the other without his consent. It must depend on their contract. But there can be no such construction given to their partnership contract unless it is expressly so. For the Common Law knows of no such thing. 2 Mod. 228.

Defences to Actions on Contracts. c. Arbitrament & Award.

When originated this Question - it was a case of much importance from the number which were concerned. It was this - A ships Crew appointed A. & B. of their company to submit a Question for the whole crew. They submitted to Arbitration & the award was, as them. The Crew were dissatisfied with it & wished to set the award aside, and the Question arose were all bound, or only the two (A & B.) to the amount of their interest? (there being no doubt but A & B. were bound). It could not have been a Question if a power of Attny authorizing them to submit had been given by all, for then it wd have been by act of all. I can see no good reason why the Judge why it was ever made a Question. There was an appointment to which the Crew all agreed. Hence it was a power for A & B. to act, & I conceive the whole Crew were as much bound as if they had executed a power of attorney. Wigd on Awards 2.5. In this case the two agents were bound, because they were parties. But when an Agent in common cases having authority to make a submission, his principal only is bound by that submission. He must act for & in the Name of his principal, & then he (the agent) will not be bound, but the principal will. The maxim is "qui facit per alium facit per se". But if the agent specially by express terms binds himself & not as agent merely, but in his private capacity then both principal and agent are bound. An Attorney to bind his principal by submission, must have express authority to submit. But if he submit & bind such express authority he will be himself be bound, tho his principals will not be. A right to submit is not implied in a general power.

Her must attend by y^e Business of his Client in Court - this is his duty; but tho' he can compel him to submit. Still, altho the Atty. has not an express authority to submit: if the submission is by rule of Court the principal is bound, & the Atty. is not. For the submission being by rule of Court it is his duty to attend to the business. 12 Mod. 216. 1 Salk. 70. 12 Mod. 246.

If a Husband submits a controversy concerning his wifes property whether she will be bound or not depends upon this circumstance "is the property at his disposal?" If so, he may submit & she will be bound, as E.g. disputes concerning a her Chattels real or choses in action; but where he has no power over it, & it is not at his disposal, as in Annuity, he has no right to submit & if he does, she will not be bound by the submission. So likewise she will not be bound by any awards on a submission of his, respecting her Lands, as for instance a dispute concerning a trespass upon them or for waste in cutting timber upon them &c He has no right to her real property. All the right he has originates from the Marriage contract; the use of it is his while Coverture continues, & he may receive the Damages to which the trespass is liable to possession, but the ultimate property in the Lands is in her. That property which he can dispose of will be bound by arbitrament and no other. 1 Mod. 94; 1. Rose 264.

In one of the above Authorities Noy 94 there is a strange idea suggested by the Court viz that if y^e Wife joins in the submission she will be bound. But

it is not so. It is not ordinarily speaking bound by any Contract of hers. & if she would she may be bound if the submission was by rule of Court.

You will find it laid down in y^e Books that when an award is brought in & a man has dies no action lies upon it, for his Exec^r. This is y^e old rule: the action of Debt which was y^e usual action on y^e award would not lie. The rule was founded on this, the action of debt was here founded on simple Contract & in such action the Testator might have waged his Law & the Exec^r cannot do this for him. This rule is obsolete, & the Exec^r is now as much liable as if the Testator had given a Bond. Cro E. 600. 2 Ventris 249. 1 L^d Ray^d 248.

I have observed that almost every thing was a subject of arbitration - every action of a personal nature which is arising from Contract or tort is arbitrable, with one exception viz. When a Debt by the instrument evidencing the debt is reduced to a certain sum as a single bill for 50£ or a Covenant for 50£ or a judgment for 50£. These were certain & they said there was nothing to submit - that it was the business of arbitrators to reduce uncertain things to certainties & when there was no uncertainty. They contended that the award did not extinguish the original liability or debt, & could not therefore be a Bar to an action on the Specialty Contract. They did not contend that y^e subject was not arbitrable, for a bond to compel it would be forfeited. But why did it not extinguish y^e Debt? The reason was that the debt was about to be avoided by an award which was of a Court

nature than the Specialty & this was contrary to ye maxim "unum quodque ligatur eo ligamine quo ligatur dissolvitur". I have already remarkd that this maxim is done away in Engd by the Statute respecting giving payment in Evidence; the reason of which Stat. applies to this case. When that maxim is disregarded it follows of course that it extinguishes the debt. There never was any Question raised on the ground of its being a "Bond". If the debt did not grow out of the instrument it wd extinguish it. When the Bond cd be proved by parol proof it extinguished the debt: Secus when it cd not be proved by parol. 6 Co 43. 1 Lev. 292. Cro E. 422. Cro Jac 199. 1 Rol. 937. 2 Ld Ray. 1115. & Mod 231.

You will remember I mentioned the case of an award concerning real property; that if a Bond was given it was forfeited, but the award was nugatory - it wd give no title. It is the subject of arbitrament, but owing to the circumstance that ye award can give no title it is idle to submit without a bond is given. But the Question was is it arbitrable? In one Book it was said the award was void. In another, that the award passes ye Lands. Neither of these are true. In another Book one of ye Judges said an award of Trifles was void; & in another, that if the submission is by Deed it conveys ye Land; this last is contradicted in another book. - In another Book it is said that the award does not pass ye Lands even the the submission is by Deed, yet if a Bond is given & the party refuses to abide, it is forfeited. This last is the true rule & all ye others is wrong. Jon Jones 168.

They afterwards said that a Lease for a term of yrs

was not a subject of arbitrament. This was untrue, for as Land was a personal thing it might as well be arbitrated upon as a pair of Shoes. Before the Stat. of Frauds & perjuries a Lease might have been made by parol & this a chattel interest being arbitrable it was decided that by an award, of a term for years the Estate by such award vested in him to whom it was awarded as does a Settlement. Cro. 223. But since the Stat. of Frauds &c. no title to a Chattel real can be given by award. For some Chose it can only be conveyed in writing. The great difficulty was how to enforce an award when made & it seems doubted down to the time of L.d Ray. 105.

The mere magic of an award gives no title but if the party to whom the award is made will not agree to the award & any party bound he will be liable in Damages on his promise to abide the award, whether that promise were express or implied, written or parol. Or if a Bond is given it is forfeited on the parties refusal to abide the award.-

Who may be Arbitrators.

The rule is this - 1st. All persons who have not sufficient discretion, 2d. All persons who are under the command of others, and 3d. All persons attainted of Treason or Felony cannot be Arbitrators. As to the first class what does "sufficient discretion" mean? It includes Idiots, Lunatics, Insane persons &c. But suppose a sensible man not young, [illegible] of 20 years of age who is capable of doing business, is he included in or under this rule. "persons who

have not sufficient discretion"? Judge Nares does not suppose that the rule includes such persons & makes them incapable of being Arbitrators. It is not established on the same footing as their incapacity to bind themselves by Contract or otherwise. It must go on the ground of a real want of discretion. A minor may be appointed to do an act which will bind the person appointing him, & yet when he has to take an oath, and in this point of view I consider it. There must be a real want of discretion.

Women and deaf persons are included in this rule but if they can be proved to have sufficient discretion they may as well be arbitrators as to bind themselves by Contracts which we have before seen they may do.

2nd. As to the second class "persons under the control of others". This is the reason that Married Women cannot be Arbitrators. Not upon the supposition that they are lacking in discretion, but because the Law supposes them under the coercion of their Husbands, this in reality this is not always the case! on the same ground a Slave subject to his Masters control cannot be an Arbitrator.

3rd. As to the third class "persons attainted of Treason or Felony" cannot be arbitrators, because it would be disgraceful to let them determine for other persons. The nature of Arbitration & the Law respecting it are different from all other things. In ordinary cases a man cannot be a Witness for himself, but before Arbitrators he may. A man in ordinary cases cannot be a Judge in his own cause, but here he may. And also

of this is the English Books: any thing in Eng^d which occasions y^e death of a person is a Deod and forfeited to the King. By royal franchise a certain Bishop was to have all Deod anos within his diocese, a man was killed by a cart wheel running over him! and the subject was agreed to be referred to Arbitrators to decide whether the wheel was forfeited or not. The party chose the Bishop as one of the Arbitrators, & he decided in his own favor. The party then attempted to set aside the award by saying, that no person ought to be a judge in his own cause, but the award was confirmed & held good. Comb. 218. 4 Mod 175. 2 Vern 100. Hard. 43.

Umpirage.

It is a common thing in submissions, for y^e parties to choose two Arbitrators to decide y^e controversy & in case they do not agree to appoint a third person to make the decision, who is called an Umpire. The proceedings are Umpirage. Sometimes the parties delegate the power of choosing an Umpire to the Arbitrators, who must then in case they disagree proceed regularly to elect an Umpire according to y^e instructions of the parties. Tho it is settled that Arbitrators cannot appoint an Umpire by chance, as by casting lots, they must exercise their judgments. 2 Vern 435.

There was formerly a notable dispute on a case like this. A submission to Arbitrators to award by a certain time, viz. 10th January, & if they disagree to appoint an Umpire to decide the controversy by

that time. It was formerly considered the Arbitrators could appoint no Umpire before that time, 10th Jan. because they had till that time, for themselves to agree: and it was held that there could not be a concurrent authority; and if it seems if they could not appoint before the time no Jury they c^d not after its expiration, for with that expired their authority. Sometime afterwards the Courts took another step & said if the Arbitrator did not agree in the limited time, but went to the Umpire & bid him, he might make it in ye limited time. But as the Law now stands it is resolved that ye Arbitrators appointment of an Umpire is an abandonment of their authority; therefore they may appoint ye Umpire, may award at any time before ye day fixed viz 10th Jan^y. Nothing must be shown but that ye Umpire made ye award, & nothing is shewn to ye Contrary, the presumption is that ye Arbitrators threw up their authority. So too where a day time was limited to ye Umpire, as suppose the Arbitrators were to decide by the 10th Jany. & if they disagree, the Umpire was to decide by the 15th Jany, it was formerly held that the Umpire c^d not award before the 10th as they said his authority did not commence till that of ye arbitrators was at an end. But ye Law is now established the other way, the Arbitrators and Umpire having a concurrent authority, therefore the Umpire may at any time before the 10th Jany. make an award & it will stand good, provided the Arbitrators make none by that time. Ky 478. 2 Keb. 15. 33.

Defences to Actions on Contracts. — Arbitrament & Award.

On a Submission to Arbitrators limiting them to a certain time to make their award, was if they could not agree by that time, then to appoint an Umpire; there it was formerly held that no Umpire could be appointed within the time limited but only on the last day. If their time was limited to the 10th. day they could appoint only on the 10th. But it is now settled that they may appoint at any period within the time limited. It is frequently the very first thing the Arbitrators do, then appoint an Umpire & then go to buy, if they cannot agree they call on the Umpire. Thus was it said in an old Report that giving the Arbitrators power to appoint an Umpire was void. They reasoned elaborately to establish this. They said they could not appoint during the time, & if they postponed it till the last moment, that moment was as much of their time as any other, & at, & as soon as that last moment elapsed their authority was at an end & therefore they cd. not appoint an Umpire at all. But this is now contrary. Ryd. 50. 2 T R. 645. 1 L. Ray. 671. 1 Salk 71. 1 Mod 275. 2 Vern 100. 3 Ray. 187. 205. 2 Jones 168.

Another great Question. — It was formerly held that if Arbitrators appointed an Umpire, who refused to act, that on notification of his refusal they cd. not proceed to a second appointment, having by their first appointment executed their authority. But it is now settled that they have not executed their authority till the person appointed accepts. Consequently they may within the limited time

continue their appointment, till there is an acceptance. The intention is they must appoint effectually. 2 Vent. 213. 1 Sack 70. 1 S. Key 2222.

The duty of Arbitrators.

Arbitrators on acceptance are to appoint a time & place when & where they will proceed in the business of their appointment; and are to give notice thereof to the parties. When they have met according to appointment they may adjourn to any period within the time limited for their award. If it is requisite to prolong the time, this must be done with ye consent of ye parties, as in the submission. If it is by rule of Court, the Court must prolong it. It formerly was questioned whether on acceptance & entering by the arbitrators, they could proceed in the ~~sub~~ mission arbitration, unless both parties appeared according to appointment. But it is now settled that tho' on ye parties to continue absent, the arbitrators may proceed & award upon the facts & evidence produced by the party present, & what other evidence may present itself. Equity. cases 63.

It has been a Question whether the Arbitrators can decide part of ye dispute & leave ye rest for the umpire. The decided cases say they cannot, but the practice is contrary. This is when the submission does not in terms give them that power, for such power may be given them by the parties & then it would be good. Ry & M 64.

It has also been a Question whether a majority of the Arbitrators were competent to make an award. But the Question is now at rest. for unless there be a provision in the instructions of the parties that a majority may award, no award can be made but by a joint concurrence of all the Arbitrators. In this respect it differs from a Court. The reason is this powers are joint & it is in the nature of all joint powers that they cannot be exercised by one, but must be by all. But it is customary to insert a provision in the Submission authorizing a majority to conclude the award. for otherwise much inconvenience may arise. as one may be sick &c. And when the parties direct in the Submission that a majority may award, their award is of no validity unless made in the presence of the majority, unless he wilfully absents himself, or stays away after notice given that the award will be made at such a time. Ky 67. Barnicholas 57.

This point has been also much litigated, whether an award published in the absence of the parties, they not having had notice of the time of the award, was valid, & no provision having been made that it should be published in their presence. The point is now settled & is governed by this distinction; if such award is made on the last day of the time limited it is good, but if at any precedent time the parties must be present, or have notice when the award is to be published, otherwise it is not valid.

The award must be pronounced all at once; the Arbitrators may not make out the different items

of the award separately, but the complete award must be pronounced at once. Vid 77.

There formerly was a disputed Question; viz Where the instructions to the Arbitrators were that the award should be delivered to the parties by such a time, was this to be a written award or was a parol publication in the presence of the parties a delivery? The Ct. (at Chiswick) not willing to set aside awards said that a parol publication in the presence of the parties amounts to a delivery; and so the award delivered in that way was good. Another case was this, the provision was that the award should be made this ready to be delivered to the parties by such a time. The Court held that a parol award which was in readiness to be delivered at the time was a sufficient compliance with the provision. They said the last case governs this; if the instructions were "to deliver it," and a parol publication in the presence of parties was sufficient delivery; a readiness to deliver a parol award was sufficient compliance with the provision "to have it ready to be delivered." From this it may be gathered that unless there be an express provision that an award be made in writing, it will be held that by parol. And the rule now is, owing to Courts inclining to favour awards that an award shall not be destroyed by implication. 4 Keyes 78. 6 Mees 160. 5 Co 103. Cro E. 885. Doct. 2. Lecture 9th January.

Of the Arbitrators Powers of reservation.

You will see it said that Arbitrators cannot reserve any authority to do an act subsequent to the time limited

for their award. Tho' Arbitrators can reserve no authority to do a Judicial act subsequent to y^e time limited for award. Therefore an award that A^th pay to B 20^l by a certain time, but if more th^n appear due at that time, that he should pay more" was void, not only because no such authority can be reserved, but also because an award to be valid must be finall. But they may reserve an authority to do a subsequent ministerial act for the due performance of their award notwithstanding the act to be done be absolute certain & finall. As where the award was that A pay B 20^l per acre for a certain Lot of Land (the number of acres being unknown, or its quantity being ascertained: This is not reserving a Judicial authority &c but the quantity is to be ascertained by a mere ministerial act, & therefore such an authority may be reserved. Or if they award that A give B a Lease for 100 l. it is good. So also an award that A shall pay B a certain sum, the Legal Costs, which have arisen on y^e dispute; the Costs at the time not being ascertained, was held good, for the act of assessing y^e costs is merely ministerial. The Arbitrators cannot decide thing which is not submitted to them. Suppose there are five Notes submitted to them, & they award that A is indebted to B in 8 several Notes & that he shall pay them. Now the award will be good as to the five Notes submitted to them, (they all being of the same value say 10 l.) & void as to y^e three not submitted: For an award may be good as to part & bad as to part. as I shall shew you hereafter.

Palmer 110. 146. Hyde. 78. 81. 3. 4. 12 Mod 139. Cro J. 315. 2 Atk 501. Hardr. 48.

Of the Arbitrators powers of Delegation.

Arbitrators cannot delegate their authority to do a judicial act, but they may delegate their authority to do a ministerial act, such as they can perform themselves as E.g. they may delegate their authority to the Clerk of the Court to tax the Costs &c. They must award the substance of the thing to be done, i.e. the satisfaction either party is to give to the other, but they may delegate their power to do a ministerial act, or they may delegate to some person the power of determining the form in which that satisfaction shall be ~~given~~ made as where the award was that a release of rent should be made, and that A (a 3d person) should describe the form of the release, or on ye Example just given where an awarding the Costs that have arisen on a dispute they may award ye proper officer to assess those costs. 1 Salk 75. 1 Sid. 358 or 38. 2 Atk 519. 2 Ld Ra 787.

It will not do for the Arbitrators to delegate their power to an incapable ignorant person. As in the example above supposed they had no right to award Tom Nokes or Dick Stiles to assess ye Costs. The arbitrators may assess ye costs but if they refer it to some other person he must be a capable person. So in ye case above where they award 4 Ld 3 qrs 15 rods per acre, if they appoint one to measure the Land it must be a person who understands measuring. 2 Ld Ra 1025.

It has been made a Question, whether an award to stand by an award as good as E.g. J. S. and T. N. submit

Submit a dispute to A. B & C whom up the award is made to D. E & F. who are also that they shd abide by the former award made by A B. C. They pretended that this was awarding on y^e opinion of others. But it is not. It is agreeing in opinion with them. it was agreeable to the former judgment, but it was not awarding on y^e opinion of others. The award was held good. This is an insolation case & not likely to occur.

The requisites essential to an Award.

It is essential to an award that it does not extend beyond y^e submission. more to y^e person of a stranger. But that it embrace all that is part of the disputes submitted. That it be both physically & morally possible. That it be reasonable. That it be mutual. That it be certain, and that it be final.

1. It must not extend to a controversy not within the submission; which means that the award must not embrace any disputes of y^e parties not included in the submission; and if it do the excess is always void. and sometimes the whole award is so. If it is a submission of all actions, it is of all controversies disputes & demands, whether founded on Contract or Tort. But if the submission refers to only actions on Contract, or also founded on Tort, it embraces them only. Tho it has been done that where a collateral article can be awarded in satisfaction of a claim, It was said there was a difficulty in this case because Arbitrators could not grant Execution, and

thereon could not carry the award into effect. But if y^e action had been brought in a Court of Law they could have granted Execution & they &c have compelled Specific performance. But Judge Nares is clearly of the opinion that Arbitrators can award collateral matters in satisfaction of a claim or injury done. It does not vest the property but it is conclusive of y^e right. The rule formerly was otherwise, & they said it was extending the award to things without the submission. But how can that be? The fact is, the award was about the thing submitted & nothing else. It does not come under, nor is it affected by the rule "that the award shall not extend to things without the submission." This argument fails and the cases found are sufficiently numerous to establish y^e doctrine that Arbitrators may award collateral property. There is one case which they rely upon, the Arbitrators awarded that one party should cock two bucks for the other, & that this sh^d be in full satisfaction of all disputes, claims &c. The Court set aside y^e award but it was not because collateral prop^y was awarded, but because it was so trifling & childish that they w^d not encourage such awards. 6 Mod 221. 2 Kay 1039. 1 Sid 12. Keyes 94.

There never was any Question but Arbitrators might award a security for money to be paid at a future time. They may order any appendages for the fulfillment of y^e award. Whatever was apparently the object of the parties to have settled may be awarded & settled by the arbitrators; as where there was a dispute between a parson & parson concerning y^e payment of tithes

the parishioner claims h. was exempt from the payment
of tithes, they refer it to Arbitrators. Now what was
due? The money was to be paid if the person was success-
ful, but the grand object which they had in view was,
the right, and by arbitrators is meant their award & that
law made that no tithes were due and that the Parson
should give the parishioner a release of the right; and this
they had power to do. When there is a general submission
they may award mutual discharges of all dues. So on
a submission by partners, the Arbitrators may if the
submission is extensive enough break up the partnership.
So where a dispute between Master & Servant is submit-
ted to Arbitrators, they may award the Servant & award
that the Master shall give up the Indentures. 1 Bl. R. 475.
2 T. R. 645. 3 T. R. 626.

In the Law once was it was supposed that
Arbitrators cd not do this but the Law is (long since)
altered. They formerly considered that this was not
within the submission. But the Law I say is now
otherwise. A Question arose in a case of this kind,
Stiles & Stokes had a dispute left to Arbitrators,
they awarded that Stokes shd give up to Stiles a Bond
which Stiles had given him a few days after the sub-
mission. It was contended that this cd not be done.
There was no Question about the Bond being given af-
ter the time of submission, but whether they could award
a collateral act to be done. The Law is now Stiles
now, for I have told you a collateral act may be
awarded to be done. Eng. 99.

Defences to Actions on Contracts. Arbitrament & Award.

I will now give you some history of y^e different resolutions in y^e Law concerning an award. Suppose an award that that mutual Releases of all disputes should be given up to the date of the Award. Now it was formerly contended that all the award was void, because since the submission some disputes might have arisen, therefore the award was more extensive than the submission. This was at a time when Courts wished to set aside every award, & they said it was void, merely on the supposition that there might have arisen new disputes. Afterwards Courts said they wd not set aside y^e award unless it was made to appear to them that some new controversy had arisen after the submission. & if that appeared they would set it aside. But the Law now is, That if they award mutual releases shall be given up to the time of y^e award, the releases cannot operate upon any thing which occurred after the submission. It operates only on the controversies submitted. Keny 165. 10 Co. 132.

(It was the ancient idea that Arbitrators, unless special provision was made therefor, award no Costs, they arising subsequent to the submission, & therefore not within it, but Costs are now considered as appurtenances of the dispute submitted, & may therefore in all cases be awarded, unless special contrary provision be made. Cro. Jac. 577. 10 Mod 201. 2 Str. 645.)

2^d Branch of the rule was that an award must not extend to any person who was a stranger to the submission. The ancient rule was that if any

thing was to be done (agreeably to the award) to any by a stranger, the award was void. The rule was not in some degree mitigated, & it was held an award to a stranger was a valid provided it was for the benefit of the party who has received the money & in satisfaction of what it was made. Suppose they award that A. has leave to plant &c. a stranger. So & nothing more was said, the award was void, but if it could be shewn that C. was a creditor of B. it was good. So the Law now stands an award to a stranger is prima facie valid in all cases, for it is presumed in such case to have been made for the benefit of the party injured & cannot be destroyed till the contrary is shewn. Thus where A & B. had a dispute about Blackacre, & they submitted to Arbitrators, who awarded that B. shd convey it to A. and his Wife, the award was good; for it was her property tho' had no estate of it only. It was therefore proper that She shd be included altho she was a stranger to the submission. 8 Co. 75. 15 Hen. 8. 12 3. 1 Salk 74.

So where C. had a claim of an assigned Obligation of B's. the obligor; A said he did not owe it, upon which A & B. submitted, & the Arbitrators awarded that A. should pay the amount of it to C. - The award was good for it being assigned to C. he alone was entitled to the money due upon it. 10 Co. 131.

Suppose again that A. & B. had given a Bond to C. & they had disputed between themselves how much each shd pay, they submitted to the Arbitrators —

award that Ath pay 2/3ds to C. and B 1/3d to C. this award was held good the C to be paid to a third person. So where A & B. (two brothers) had to support their Mother, and they disputed about it, submitted to Arbitrators who awarded, that Ath pay a certain sum & B a certain sum, the award was good. These are all the cases that I know of where the award extended to persons who were strangers to the submission. But there is no sense in saying that the award cannot extend to 3d persons, when it is beneficial to the party in whose favour the award is. Cro C. 541. 1 Mod 9. Ky d. 105.

But an award that an act shall be done by a stranger is always void as it respects the stranger. The Stranger cannot be compelled to perform the award. But it does not follow that one of the parties shall procure a Stranger to do an act. is void. As if he was a Trustee &c but this 3d person, must be in the power of the party.

Another rule is this" That the award to be valid, must embrace all & not a parcel only of the disputes submitted. This rule is liable to much qualification for on an apparent submission of more disputes than one, there in fact being but one, a decision on that one dispute that really exists, without noticing the others named in the submission is a sufficient compliance with the rule & the award will be good. Suppose the submission is of "all actions personal & real", & the award says nothing of "real actions, it is good, unless you shew that there was

some controversy of a real nature brought up. According to the old rule it was void. Sims now. 8 Co 98.

And tho' in fact more controversies are named in the submission in general terms, & more really exist than were decided by the award, yet if the Arbitrators award upon all which the Arbitrators disclose to them, their award is still valid. And prima facie every award is made of the controversies decided, & therefore cannot be overturned till the contrary is actually shewn. It is not sufficient to shew merely that were other controversies between the parties, but it must be proved that they were brought before the Arbitrators. If the submission was "of all disputes" an award about one is good, though there were more, unless there were more laid up before the Arbitrators. If more than one is proved to have been brought before the Arbitrators they must decide only on the one the award is void. Cro E. 858. 8 Co 98. Cro J 250. 355.

It was formerly contended that in a general submission of all disputes, if the parties put in an ita quod, i.e. that the award shd be good provided all the controversies were settled, it would make a difference. But it does not now. It is now well settled that if one only is decided their award is always prima facie valid, & can be destroyed only by actually shewing that they did not award upon all the disputes brought before them. This may be proved by parol. 1 Burr 274. 4 T. R. 148.

There are all the cases where the submissions were of all controversies in general terms and none specific. Now you have already seen that there may be 100 disputes

Mr Jencks to Atkinson on Contracts. Arbitrament & Award.

If one only is brought up before the arbitrators the award is good. But suppose the several controversies are specifically named, as for instance, the submission is of all controversies viz. Slander & Assault. Battery, Contract &c. will that make a difference? It will not - the award, or Contract only, is good if no more were brought forward unless there was an ita quod, viz. that the award &c. were unless they decided on all the controversies submitted. But where more causes are specified without having the ita quod clause, one may be determined without the others if they are not brought forward. The award is no bar to the actions that are not brot forward, as to those which are. But in all these cases if more were not brot before ye arbitrators than they decided, the award is utterly void. When there is a submission of all controversies, & those specified, & there is an ita quod clause, the award is prima facie bad unless all the disputes specified are awarded upon; but by shewing that all the disputes which in fact existed or which were disclosed to the Arbitrators were settled by the award, it may be rendered valid. If in such a case (i.e. where the submission is of all controversies & they are specified, & there is a provisional ita quod clause) the arbitrators decide all submitted & likewise decide another controversy not specified, the award is good as to that not specified, & as to ye one not specified it is void. They must settle them distinctly saying so much for Slander so much for Battery, so much for Contract &c. It will not be good, if ye Last one not specified is made use of.

In such case the whole award would be void. If they had awarded distinctly for each one, & then so much for the one not specified, the last only is void & the rest good. Ky & 114 - to no. Bro C. 216. Hob 49.

To return to y^e requisites an award must have, and without which it is not good.

4th. An award to be good must be physically possible. The legal impossibility is y^e same as in Contracts. It must be possible in y^e nature of things, tho it may be impossible to be performed by y^e party vs. whom y^e award is made. Suppose they award that T. S. shall procure a Deed of Black Acre & deliver it to P. S. when T. S. did not own the land and had no power or control over him, tho he did own it. Now T. S. could not procure it. Judge Reeve thinks this case may be classed under that of awards as physically impossible: but if the party has been awarded to procure an act to be done by a stranger, over whom he had a sufficient authority therefor, it would have been valid. Suppose in the example first given, they had awarded that T. S. procure a Deed of Black Acre & deliver it to P. S. when he (T. S.) did not own y^e land, or know who the owner of it was, & they had put the award in y^e alternative, that he sh^d do so, or pay P. S. 1000£. The award would have been good. Arbitrators may award in y^e alternative.

5th. The award must be morally possible or it is not valid. Arbitrators must not award vs. the Law of the Land, i.e. they must direct an unlawful thing to be done. It is laid down that they must award what

is Legal. By this is not meant that Arbitrators cannot award in a case where a recovery c^d not be had in a Court of Law. As where a man calls another a Scoundrel, liar, a good for nothing dirty, stinking, lousy weasel faced old fellow, now if an action for them were brought into a court of Law, & a recovery claimed therefor, it w^d be galloped out of Court (before you c^d say "Jack Robinson.") on Demurrer; but in this case if they had agreed to submit it to arbitrators, & they had awarded that the person who had such ready Slack should pay the weasel faced old fellow 40^ll for the injury he had received, it would have been a good award. 1 Sid 112. 2 Mod 243

6th. The award must be reasonable. But by this is not to be understood that we may enter into a nice discrimination of the justice or injustice of the decision or award. But where upon the face of it the award appears unreasonable, Courts will set it aside. Or if an award is that a man shall do a thing which in the opinion of y^e Court is unreasonable, y^e award would be void. If the award were that one should bind himself in service to the other it would be unreasonable, for this would be to take away his personal liberty. And on that ground all these cases are decided. Suppose the award is that B. shall give a bond to A and procure C. to sign with him, it would be unreasonable. As to C. the award would be nugatory, viz. if C. did sign the award would be good. Or where the award was that B. shall find such security as A (the plt) pleases, it would be unreasonable, because it ought not to be

to A to determine what security he would have.
But it wd not be unreasonable to award that B shd
compel C. over whom he had power to do a certain
thing. And on ye grounds of it's being an unreasonable
thing, an award was set aside, which directed that A
should pay money, which he owed to B, at another (a
Stranger) house, as A did not know that the Stranger
wd ever bring into the house, and if he did enter it, he
might be subjected to trespass. This was the old rule.
It is not so now for if he could not get into ye house
he might go as near it as he could. Ry. d. 134.

Sc. vo Mr 3. 1812. Dec. 10. Irwin. 3

7th. An Award must be certain. Many awards
have been set aside on ye grounds of uncertainty. When
an Award is that a man shall enter into a Bond, which
is intended shd be a Bond with a penalty, for a certain
purpose, not mentioning ye penalty to be entered into,
but merely saying a Bond for 100£ the Question arose
how large must the penalty be? What the Court said
the Award was not uncertain on that account, for
this is regulated by Custom, viz. double ye sum.
When a man directed by an award "to deliver up a
Trunk with Several Books" it was held to be uncertain.
For "several books" is a vague term. The doubt of ye Ar-
bitrators meant ye books contained in ye Trunk, but
this did not appear. But tho' there may appear some
uncertainty or ye face of an Award, yet if it may be
reduced to a certainty by a reasonable & fair construc-
tion, or if ye meaning can be ascertained by ye context,

or may be learned from the nature of the thing awarded or from circumstances connected with it, the Ct. will not set it aside. As where ye Submission recognizes a debt due from A to B. and the award is in these words "that the debt shall be paid, & a release therefor given" this is a valid award, because it is easy to determine who is to pay ye debt, as it is mentioned in ye Submission "that A owes it to B." But such an award was formerly held bad on ye ground of uncertainty who was to pay the debt & who give the release. Again there was a wharf erected by A on land which both A & B claimed, & the Arbitrators to whom it was submitted awarded that "Defend shd enjoy ye land and the wharf, but ye scaffolding should be pulled down". Now who was to pull it down? The Defe. says it is unreasonable that the plff. should not pull it down as he erects it on my land. This may be ascertained from the Contract; the scaffolding was a nuisance, & if so ye person who put it up must pull it down. By this means ye award is rendered certain. 2 L. Ray. 1076.

So where there is a rule by referring to which the apparent uncertainty may be done away & the certainty ascertained the award is good. As where the award was that A shd pay the legal costs. By application to the proper officer, or referring to the established bill of costs, those costs may be ascertained. And further an award is not uncertain because it is conditional. As e.g. an award "that A should enjoy B's house

for the term of 3 years, on condition of his paying 30£ yearly, & in case he fails paying that sum annually he shd not enjoy the house". Now this was certain enough. Cro J. 423. 2 Sand 292.

And it was held that the law formerly was otherwise, that an award may be made with a penalty or in the alternative, as when A has contracted to convey Blackacre to B but B coming in offering something more he sets it to him &c. 3 Leon 4 & they afterwards submit to the respective Arbitrators who awards that A shall convey the land to B. & pay him 100£ this was right & there was no uncertainty. Noy 38. 12 Mod 586.

So formerly an award was considered uncertain if no time when, or place where the payment was to be made, was fixed. But now no objection can be taken to such an award, it must be performed in a reasonable time & place at y^e payers residence. Whatever apparent uncertainty there may be, may be explained by an averment from this or some known standard or rule to which resort may be had. As e.g. where there was a dispute about Land & the Arbitrators describe that the dispute was about Farthdown &c. Southdown & the Award made mention of Dyke down, & Ash down; now in this case by making an averment that Dykes down was South down & Ash down North down, the award is rendered sufficiently certain. Cro E. 676 Sid 61 Keb 612.

But you can't make an award when you have no Standard to resort to, as e.g. an aw^d that A pay as much as in good conscience he ought to pay. This aw^d is void because there is no rule or reference to resort to, by which it can be rendered certain.

8. The Award must be final. This means that it must put an end to the existing controversy. It does not mean that the award shall not be a ground of a future controversy. Where the award that y^e Plff. shd be nonsuited. this was bad - it did not put an end to the existing controversy, for he might immediately sue again. 6 Mod 132.

Another Case - An award was that a man should enter a retraxit, and by the Com. Law a retraxit of a suit prevents any after suit being brought. & therefore this Award wd be final where y^e C.L. principles govern. This is very important to be known. In some of y^e States they have Statutes enacting that a retraxit shall be no bar to another suit. So is the Law in Conn. & there this award would not be final. Keyd 142.

So where y^e award was "that all suits should cease". The Courts said it meant that all suits shd cease forever & therefore y^e award was good. It put an end to all y^e disputes. 6 Mod 33. 2 Ray: 961. 964. 2 Stra. 1024. 903.

I find a case where this Question came up. The Award was "that the owner" (of a certain obligation "shd not sue it or cause it to be sued". The case was not how ever determined, it went out some other way. But I think it was as good an award as the one above. Viz all suits shd cease. Suppose they award a sum of money to be paid at a particular day, they formerly construed this was not final, as it would tend to a Lawsuit; but such doctrine is not correct. It did put an end to it. So in case they directed a Bond to be given, it wd Law bar

ol.

the same. The rule means that it shall put an end to the thing that is in dispute. Salk 110. 2 Str. 1082. 1 Sid. 89. Comb. 456. 1 T. R. 73. 2 Mod 232.

Q. How Award must be mutual. They distinctly say it must be advantageous as well as mutual. They amount to one & the same thing. Under this rule the old idea was that to make an award mutual, something must be awarded to each party, as a two penny knife to one and 100£ to the other. The idea was an absurd one, without each party was in fault. But it is not necessary that you? Sh? give something to both, for it is considered sufficiently advantageous to both parties if the award will enure to the benefit of both. Arthur A. in satisfaction of Trespass committed on B. is awarded to pay 10 £. The Award discharges the trespass when the said a release Sh? be given. The first step taken was that there was no necessity of awarding a release, but it must appear that money was paid in satisfaction of the Trespass, for they said an award of a thing to be done was not valid, unless the injury or thing for which it was awarded was pointed out by the award. But the Law is not so now for it will in such cases presume the thing to be done was awarded in satisfaction of the dispute or injury pointed out in the submission. Another case where the Arbitrators awarded that A? Sh? pay B. 3 £ concerning the premises. It was mutual enough — Again when the submission stated that "Whereas there was a certain dispute between A? & B. of & concerning" &c. &c. and the Arbitrators made their award in these words, that "A? pay B? 3 £" &c.

without saying what it was for, or without saying "concerning the premises". But the Courts said the Submission mentions the dispute & by taking all the circumstances together it was sufficiently sure. You see then that the difference in y^e authorities is not about the principle, but what shall be evidence of it. See the 3d rule in Hobt. 49. 1 Sc. Rep. 246.

I mentioned that formerly an award that a debt be paid without awarding a discharge thereof, or awarding that the payment be in satisfaction of the debt due, was considered as void. But it will now be valid. I have to remark that the presumption of Law now is, that it was to be paid in satisfaction of the debt due. The presumption is that the award must have been about the thing submitted to them, & it is absurd to suppose any thing else. The rule is laid down by Comyns that an award made on a Submission is to be understood as concerning the thing submitted. Com. R. 328.

If an Award wants any of y^e foregoing requisites which I have mentioned, it is not good in Law.

Of Releases &c. Formerly an award of a thing to be done in satisfaction of all dues was void, for say they, it is possible there may be many controversies not submitted. But y^e modern idea is that it relates only to what was submitted. Palm 108.

On the same principle an award to pay £10 in full of all demands was void. aliter nunc. To the old idea was that an award directing mutual releases to be given up to the time of the award, of all controversies

was void. But as the Law now stands it is good, for the release operates only as Controversies up to the time of the submission. Such a release is now understood differently from what it formerly was. 2 Mod 169. 1 Show 272. 1 S. 12 Ray. 115. 2 Jo 964 10 Mod 201.

Of Awards voidable in whole or in part.

An Award may be void in part. Sometimes, the void part renders the whole void, and, at other times, the void part alone is rejected & the remainder is good. You will find some difficulty in reconciling the authorities, I have extracted the Law upon this subject from the whole of them. The old first idea was that if part of an award was void, the whole was so. This was unreasonable, & in consequence of the rule caused the next Court to go to the opposite extreme, viz. that all but the void part should stand valid in every award. This also was found to work inconvenience & injustice, & was equally absurd as the former one. Courts have therefore now adopted the middle ground, sometimes rejecting the void part only, and sometimes considering that part as rendering void the whole award.

If A & B. have claims & B. is awarded to pay to A. £20. all this is proper & within the submission & he is also awarded to do something without the submission, as to do something illegal, now this award was void in part & good in part. The established rule is this. If A is willing to accept of the part that is legal & good, B can never refuse to perform the legal

part, because the rest was bad. But if A will not take up with the legal part but claims the whole, B may refuse to do any part. Many of the cases stand on this ground. Another case is as I have mentioned before. Suppose they award that B. pay A. £100 in six months, & that he secure the payment by bond, & that he procure J. S. to be surety. That part of the bond which directs B to give A. the Bond for 100 £ is valid as it affects B. but that which directs him to find surety for the payment is void as to him. Yet if A says, give me the Bond only payable 6 Mos hence, & I do not want you to get J. S. to sign as surety, B. cannot refuse, for A's offering to accept the valid part only renders it good. But if A refuse to accept the Bond without the surety, may refuse, for the whole award is thus rendered void.

But Contra suppose B. is willing to perform both the good & bad parts of the Award can A refuse it? If that part of the award which is voidable is favourable A never can refuse. Tho' in the case above B. is not obliged to find surety, yet he may do it under by virtue of the bond & surety validates the whole award, and A. cannot object to such an award if B. will comply with it.

3d Third Sett of Cases. Several claims are submitted on both sides, and ye arbitrators take in some matters not within the submission (which is a void act), & then make out an award in gross, i.e. award an aggregate sum. Now this part which is bad renders ye whole bad & the award is void in toto. But suppose the different disputes had been specificated - they allowed so much for

each dispute, then what is out of the submission may be rejected & the rest which was within the submission will stand good. If being void in part does not affect the rest. The void part constitutes no part of the legal award. If you can reject that which is right, but this cannot be done at common law) where the same award as in gross. Suppose on the same principle the Arbitrators find on what is submitted that A shall pay B. 100£ & they find on something else which they think is submitted, but which in fact is not, that B. owes A 100£ & they make an offset, & make out their award "nothing due to either" the whole award is void. So in all cases if part of the award is void & that cannot be enforced, by that means the mutuality is destroyed, the whole award is void, unless the mutuality is restored. Thus when on a dispute between A & B. the award is that A pay B. 100£ and B pay A £ costs, Costs being then according to the old rule not awardable) here the whole award was held invalid, there being no mutuality of benefit arising from it, it would be unjust that A shd be obliged to pay the 100£ when B. is bound to pay the A £. But if B. would, notwithstanding the voidness of the award, have a mutuality thereto, made payment of the A £ costs & would have rendered the whole award valid & A. wd then have been obliged to pay the 100£, the mutuality being then restored. Because it is a rule when one of the parties is rewarded to do a void thing in consideration of a valid thing to be done by the other party, he may by performance on his

part (tho the award as to him was void) bind the other party to perform the thing awarded, tho award as to the performance of that thing being valid. Agreeably to this principle where the award was that A should convey to B. a piece of land, together with his wife's right that she should join in the conveyance & B. should pay 100£ to A. there it is said to be unreasonable because A cannot compel his wife to join him in the conveyance, yet if she come forward with his wife to offer a conveyance, it will purchase the award good tho she be entitled to the land. So likewise where a release up to that (viz. of yt award) was considered void, an award was that B. should give A a release up to the time of the award and A that pay 100£ to B. now the first part of this award rendered the whole void. but suppose A (as the case now stands) says give me a release up to the time of the submission - this renders it good tho B. cannot release. The first is that if the persons to do the void part will do it, the award is good tho the other cannot refuse.

Again - if the mutuality of the thing to be done is preserved the award is good, tho the thing is not done, or in other words, where an award is void in part, but so that its invalidity be not subversive of the benefit of the other party, the good part shall not be thereby destroyed, as where in satisfaction of battery &c it was awarded that A pay B. (the party beaten) 10£ & that B. & should execute a release up to the time of the award (such an act of release being then void by the old rule, he refused to pay saying the release was void

him the B. is not obliged to execute a release, yet the payment of the 10£ with a release is a discharge from that Calling, and all other injuries for which it was awarded a satisfaction. Though the release was made void by Act of Parl. no advantage to either party, consequently the 10£ must be paid & the release need not be executed. 2 Roll. R. 12. 46. 2 Saund. 6. 6 Co. 4. 58. 6. 39. 35 H. 6. 9. 98. Saund. 293. 1 L. Ray. 114. 115. Hyd. 166. 7 Co. Rep. not. Law dictionary in 12 Mod. 587.

The form of an Award - must be very particular. Formerly great particularity was required. They had to apply to Lawyers to draw an award. This grew out of the disposition of the Courts to set them aside. Afterwards they did not require this strictness. Judge Blackstone says as favourable a construction ought to be given them as to Wills. One of the award is that an instrument as a Deed should be made out, this must be in the proper form. That is no case where this opinion of Judge B. has been determined, yet the Elementary writers suppose that this great strictness will not now be required. Barnes Notes. 56.

Performance.

An award to be a Bar, must be performed. The rule as to this subject is liberal. If the award is substantially performed it is sufficient. Compliance with the Award. E.g. An award that A. shall deliver up a Bond to B. A. had carried the Bill to the Registers Office the C. not deliver it up, but an authenticated Copy was held to be sufficient; it was a sub-

- Stanley.

substantial tho' not a literal performance. And in another case, an award that A should discontinue a cause, - Now this was held to mean that he should withdraw it - for a discontinuance, tho discontinue is not precisely of the same meaning as withdraw. And an award is performed tho the party accepts in some measure different from the award. eg. an award that A convey Blackacre to B. and B. agrees if to make the deed to C, as he has order to him. and A does make to C. this is a sufficient compliance; and so in all other cases if y^e award is performed in y^e manner wished by the party in whose favor the award is, it is sufficient, tho it is not a literal performance. 7 Ray^d 169. 13 Vin 365.

(Where money is awarded to be paid on a certain day a payment before that day is a sufficient performance). Where money is awarded to be paid & the award fixes no time for payment, or if it is a collateral act to be done & no time is fixed for performance, it must be done within a reasonable time. Where the payment or performance is delayed by the party who ought to have made it, the party to whom it ought to have been made remains easy under the delay, it has formerly been a question whether in such case payment or performance c^d be tendered & this bar an action on the original claim. But as y^e default of an award is now considered the Question must be at an end, for a good award totally extinguishes y^e original claim & gives a new one on the award; therefore the tender can have no effect on the original claim that being already extinguished; but the tender bars

an action on the award. Suppose an Award that A gives
B a lease of Land for 3 years & B to pay 10£ per ann. and A
gives y^e Lease & B. on rent day refuses to pay, A may sue
him for his rent. The award gives A a right to y^e rent
after he has performed his part of y^e award, viz by mak-
ing the lease. When there is an award of a new duty
on both parties as if a person owe A. a security shall
be given (say by Bond or Deed) to perform the new du-
ty, that Bond or Deed being given an action lies there-
on for non performance of the new duty & not upon y^e
award or arbitration Bonds. If he does not do the thing
he is awarded to do, some think the whole submission bond
is broken, but it is not so. If he give a bond to pay 20
pounds hence, it is the same as if he had paid at y^e time.
Stra. 903. Mr. 1082. — Lecture 11th Dec^r 1812. Lain 61 row.

Of the Remedy which the Law gives to every Person in whose favour an Award is, and in what manner in case of a defect in the Award, the Defend^t may take advantage of it.

The remedies upon an Award are according to y^e different modes of submission. When the submission is verbal
one Party makes a covenant unto, or where it is written pro-
vided there is no Bond or Covenant, the remedy whereon
the promise is made to abide, is on the award either by Debt
or Indebitatus Assumpsit the award being of money.
When there was an express promise to abide, the pl^ff may
bring Assumpsit on the express promise & recover dam-
ages, & he may bring Debt or Indebitatus Assumpsit. If it was
collateral not to be done the pl^ff brings an action on

the case for the performance. When Debt on Bond &c. is brought the Declaration must state the controversy (describing it); that this controversy was submitted to the award thereof - that the Arbitrators were duly elected, name them - that they awarded upon the premises (i.e. upon the controversy or controversies submitted) - what the award was, that it was made within the time limited therefor - and that it has not been performed (If the action be expressly for performance, in addition to the foregoing the plff must state the express promise to abide the award). This is where there is nothing but a bare submission. If the award is to be performed at a future time when the plff shall call on the Defend. he must state the demand agreeably to the award. Every thing the award requires to be done must be stated in the declaration. The Declaration thus containing all the essential requisites to entitle the plff to a recovery, cannot be demurred to. But the Defend. may in his plea deny any of those essential requisites, as that he did not submit such demand &c. &c. substantially is an effectual bar to the action. When the plff assigns a breach he must assign it of that part of the award which is good, & not of that part which is bad, for if he does the Defr may demur to it. As where the Award was that B. was to give to A a bond & procure C. as surety, if A. stated in his Decl.n that B. did not give the bond & did not procure C. as surety, it may be demurred to. And if Sd. cause go to trial and a Verdict be given for plff. the Judgment will be arrested, for the breach assigned is bad. 33. No. 1040 by 191. 203.

Defences to Actions on Contracts. Arbitrament & Award.

If a Bond has been given to abide the Award, & the Obligee has not resort to it, yet he may of the Obligors. The Bond does not merge the remedy on the award it is an additional security to enforce it. 1 Ra 923.

The common mode of proceeding is to give a Bond, it is almost an universal custom. The Bond is entered into with a penalty, in condition that if they abide the Award, the bond shall be void: if they do not abide the Bond is forfeited. The common mode of suing is by declaring on the penal part of the Bond, not reciting the condition thereof which points out the nature of the Bond, the dispute submission, Arbitrators &c the declaration then not differing from one upon any other bond. If the Defendant has any sufficient defence to the action, he must pray oyer of the Bond, & after reading it, state that there was a condition, and recite it (the nature of the bond appears already on the Record) & then he avers that no award was ever made. This is the common practice. The Defts liability is on the award. He pleads no award. Now this is an Equivocal term, it means that there was no Legal award upon which a recovery could be had, or that there was no award at all. It will not do for the Pltf to reply over "an award", for the Deft may mean that there was no Legal award. and by the Pltf's thus replying it throws on Questions of Law to the Jury. The Pltf in his replication must state there was an award, & what it was - setting forth every requisite which is necessary to constitute a good award according to the submission contained

in the condition of the Bond, & then assigns a breach that Defft has never fulfilled it. Thus far they have proceeded correctly. What will Pltff do now? Why, he sueth an award on the Record, & if he means that the award was illegal or defective he may demur to it. But if he means there was no award he rejoins "no award". And then this plea of no award in the rejoinder means no award in fact, & whether there was an award or not is now the only enquiry. What the pltff contends is an award appears on the Record, & the Defft may prove that it was a forgery &c. & the parties have got to the issue. If the Court say the award was a good & legal one (to which the Defft demurred) they decide vs the Demurrer. Secus, if they do not decide it good & legal. Suppose the Condition of it was that the award shd be made by such a time, the Defft may state that no award was made within that time; he does not pretend to deny that the award would not have been a good one, if made within the time; or he does not pretend to say that there was no award in fact, but that it was not made within the time specified, & therefore the pltff ought to be barred. & yet Defft substantiates this. Judgt would be rendered in his favor. Ryl 192. Ep. Dic 231. Bro. 1 278. 220. 2 Mod 77. 1 Salk. 198. 2 Ld. 194. Carth 136.

Suppose as above. Issues R. on the Bond, & R. pleads "no award" & the pltff replies "award" & sets it out & assigns a breach, that Defft has never fulfilled it. Now can the Defe. on his rejoinder set out that he did perform the award? No. He first says there was no award, and he cant now depart from it, for it is contrary to a known

known rule of pleading, which rule is not founded on any arbitrary principles of law, but on good sense. The pltff. is not prejudiced by proving non performance, which he &c. have proved had to known that the Defft. meant to rely on performance. It is not because performance is not a good plea if made in proper time, but here the Defft. "comes not & Cold with the same breath", one moment he says no award, & the next performance which admits there was an award. The Law will not permit this. 1 Roll. Ab. 519.

If the award requires the Pltff. to do any act precedent which is necessary to be done by him to entitle him to recovery he must aver performance of that act, as well as a breach by the Defft. for until he has performed he has no right to recover & he must aver it. Pro. 9. 278. 2 Mod. 77.

There are but two cases where the pltff. is able to state performance. One is, ut supra, when the award requires him to do some precedent act, & the other is when part of the award to be performed by him is void; there he must aver performance or tender of performance or his part, or his action fails. Perhaps the award was that A. 5£ & gave his bond to B. 5£ & B. procured C. as surety to the bond & B. was to convey Blackacre to A. Now when A. sues he must aver that he gave a bond & procured C. as surety, & then he may avoid himself of it, & B. cannot complain. — These are the two cases where pltff. must aver performance. Perhaps in an action or an award the defence is that he never submitted, then Defft. pleads "never submitted." But to a suit on a Bond he can never plead "never submitted."

Personable Actions on Contracts. - Pleading &c. Award.

The nature of the Bond, even on the Record, acknowledges the submission. But if Defts. means that he did not infact execute the bond, he may after oyer recital &c. plead non est factum which will amount to non submission. For the bond is, not his act & Deed if he never submitted. Thus it seems that to an action on an arbitration Bond "non submission" cannot be pleaded; but that there in fact was no award, that there being one it was illegal, or that there being a legal one it has been performed may be pleaded in Bar.

Suppose in an action on the Bond & the plea is "no award" & the pltff on his reply to this plea of no award & the Defts sets forth a regular & legal award, but assigns no breach; it may be demurred to, & this destroyed; & tho' the Defts instead of demurring rejoins, no award & the Jury find there was an award, yet the pltff cannot have Judgt for nothing appears on the Record to entitle him to it. If he expects to recover he must set out a breach. 4 Leon. 153. 24. 78.

When an award is only partially good the pltff must assign a breach on ye good part only. 12 Rep. 114. 123. 234. 2 Mod 304.

In case of an award to pay money or request, a request must be specially made before an action will lie thereon & in yt Declr that request must be specially averred. Cro Eliz 606.

Awards may be alternative; in such case the pltff when he will assign a breach must aver that neither alternative has been performed, both alternatives being valid. But one only of them being valid, a breach of that only must be assigned.

Perhaps ye Defts wishes to plead some collateral matter in bar of the action, as performance of the award, tender thereof, or accord & satisfaction; he must first pray oyer of ye condition

of the Bond, upon recital of the performance of the thing, it will be a good plea. But by reason of collateral matter, the Defr. may allege the irregularity of the award, according to the submission. Consequently the plff. need not set it forth, on his replication, nor need he assign any breach, for as the Defr. avoids the award if it was not performed there was a breach of covenant. But if plff. thinks the collateral matter pleaded in Bar insufficient, he may demur to it. If he thinks it untrue he may deny it. Cro. J. 300.

Statutes of limitations do not bar a debt created by award. —

Perhaps the defence was that there were other matters of controversy not decided by the award. The Defr. pleads no award of the premises. He denies that the whole controversy was decided. Plff. then sets out the award, it appears not to contain all the Controversies submitted. Defr. rejoins that it does not contain all the controversies submitted, the must set forth the others — to this plff. may reply no others brought before arbitrators — and Defr. may surrejoin that others were brought before the Arbitrators & they did not decide on them. The Defr. on his defence to an action on the penal part of the Bond, need not, when the award is a bad one, after over of recital of the condition plead no award but he may set forth on the Record such as it is, & then a Demurrer will be a good defence; it appearing upon the Record that no award is illegal, & therefore ineffectually bars the plff. of his action, unless he can reply another award having all the requisites. Cro. E. 838. —

Defences to Actions on Contracts. Arbitrum & Award.

Suppose an action is brot on ye penal part of ye Bond the submission being revoked, & ye arbitrators having made no award, & the Defe pleads no award after ayer precitas of the Condition, what can the Plff do? Why, he must reply Revocation by Defe. & that by Law is a forfeiture of the Bond. 8 Co 81.

There has been a Question where a Bond was entered into, with a penalty, that the award shd be made by such a time, & the parties afterwards agreed that the time might be extended, whether this had any effect on the Bonds so as to prolong the time or them? It had not - the Bonds were forfeited if no award was made within the time limited by the Bonds, & to make it answer the purpose a new Bond shd have been entered into. 3 T. Rep 592.

When the submission is made by rule of Court & the award is said you may bring your action on ye award or apply to ye Ct. for an attachment, or you may proceed on both at once. But a recovery on one bars the other, & it is therefore not common for Courts to grant an attachment, when the party has sued on the award. Hardwick 106.

The interference of Chancery when an award is made reaches just as far as Law is defective, or where justice cannot be had at Law. Where the submission is by rule of Chy. then Chy sees that the award is performed. They see that collateral acts be done as many parts agreeable to the award. But in common or ordinary cases when the submission is out of Court the parties are left to their remedy at Law, & Chy will interfere only where justice cannot be had at Law. 2d P.C. 643.

Chancy. does the performance of an award made under a rule of another Court, not on the footing of an award, but on the ground of a subsequent agreement to perform; & specially will Chy enforce the specific execution of the award when after such subsequent agreement on the parties have on the faith of that agreement proceeded to the performance of his part of the award. - Suppose the award is that A convey Blackacre to B. Now if nothing more is done Chy will not compel a specific performance. for they never will unless there is a subsequent agreement between the parties to convey &c. If there has been this subsequent agt Chy will compel him to convey, for on the faith of it B. may have agreed to convey to C. But you will remark that this is not on the ground of an award. 1 Atk, 74. 3 P. Wms. 137. Eq. Ca. Ab. 219. Free Ch. 315.

Where something was awarded to be done by both parties. & performed & accepted, & then he (B.) refused to do his part, there Chy compelled him to perform as he had engaged (B.) and it is a rule of Chy that when one party has performed they will compel the other party to perform his implied agreement. 3 Ch. R. 20. Chy 20.

Where there was an award that A convey Blackacre to B. and B. pay £900. there was a default in the award, but A goes to B. & says "do you mean to abide by the award or will you set it aside"? B. answered "I will perform my part by paying £900" & prepared his self & made arrangements to pay it, & then A wishes to set the award aside. But Chy decreed he should not.

(the advantage of the defect in it. You see that this was not on the footing of its being an award, but because it impliedly agreed to purchase. 2 Vern 20. 3 P. Wms. 157.

A dispute arose between a Brother & Sister of a Estate; they submitted it to Arbitrators who awarded that the Sister pay him £60, viz. 30£ one year & £30 the next year & then y^e Brother convey a certain piece of Land to her. She paid the first 30£ & when the came the next year to pay the remaining 30£ & tender'd to him the money he refused to accept it & wishes to return the first 30£. He however will not convey y^e Land but they compells him, because his acceptance of the first 30£ was an implied subsequent agreement to convey. The interference of Chy is always on the subsequent agreement expressed or impliedly implied from an acquiescence in the agreement. Thus Chy have gone further & said, they would interfere to prevent defective awards from being set aside, when the party defective had been a long time acquiesced in. They grant an injunction, as the party attempting to set it aside, & if he afterwards attempts it, they inflict a penalty upon him. 1 Ves. jr. Chy. 46.

Lecture 12. Dec^r 5. 1812. Clear, muddy, & now gone.

When on the face of an award it wants an essential requisite, it may always be avoided by a Demurrer in a Court of Law. But where from extrinsic causes the award is void & voidable, as when it has been obtained thro' the folly corruption or partiality of a Arbitrator, it has been usual for the party wronged or whom from circumstances partiality may

be strongly pursued; & when the award has been obtained through the unfair conduct of one of the parties, the remedy in Eq. has always been sought by praying the award may be set aside. If advantage cannot be taken of the award in a Ct. of Law unless the submission is by rule of Court; then the same cause that will set it aside in Equity will do so in a Ct. of Law. The party when by rule of Ct. is summoned in to shew cause why an attachment shd not issue, & his non compliance; the man come in & file as any of the foregoing circumstances, & if the Court find them to be true, no attachment issues. I do not know in how many of the States this rule obtains. I am sure it cannot obtain where they have no Courts of Chy. 1 Vern 315. 2 Wils 149. 3 Atk 592.

Of course a Ct of Chy does not interfere when the submission is by rule of Court. But if the time is limited & expires Chy. will interfere tho the submission is by rule of Court. Judge K. says he can see no reason why application shd be made to a Ct of Chy. What would set it aside on Chy ought to set it aside in Law. But the rule is established as above.

I shall now mention some cases. Two of the three Arbitrators were prejudiced agt one of the parties, an award must be made by all the arbitrators, or the majority must be present when the award is made out, unless he wilfully absents himself, & these two were colluding together & combined to exclude the third person & Chy will set aside the award, as there was evident partiality. 2 Vern. 515.

On the same principle where the arbitrators were observed to have frequent business & private meetings with one of the parties, they set aside y^e award. So where the Arbitrators were invested with the right of appointing an umpire & they cast lots for him. They set aside the award. 2 Vern 485.

In another case where the Arbitrators has power to choose an umpire, & they could not agree upon their award, one wanted to give 35£ & the other 95£. & about the time they appointed the umpire, a servant of his own said "I know that my master will give 150£" and the umpire awarded exactly 150£. & on this was more than either party asked, & upon the circumstances the Court suspected that all was not right, & set aside the award. 2 Vern 101.

In another case the Arbitrators had heard the cause & one of the parties supposed how it would go for want of further testimony on his side & asked them to hear him further & they promised they would, but afterwards made out their award contrary to their promise, without hearing him, the Ct. set it aside. 2 Vern 251.

In another case where there was a single Arbitrator only appointed, there had been running accounts between y^e parties for many years back, & there had been several settlements at different times & y^e Arbitrator was appointed to settle the accounts & one of y^e parties told him he was not to go back of y^e last settlement, but notwithstanding this he went back & made out his award accordingly - but they set it aside. 3 P. Wms. 362.

In another case one of the arbitrators was heard to say before he sat upon the cause that he wd make the parties, & Chy set aside the award. 2 Vesy 316.

Another case - when the parties got together, one of the arbitrators seemed to lean against one of the parties, & another observed that they had nothing to do with any thing but facts, the other replied "he cares nothing about facts, he would mulct the fellow". Chy set it aside. 2 Ves 216.

All these have been cases where there was evident grounds of suspicion & prejudice. But I shall now mention a case where there was no grounds of suspicion. The Arbitrators just were to give a price and they were not given on their award till their fees were paid to them (which was common thing) & they directed the parties to pay the fees equally between them. One party wd not pay & the other party paid all, & tho' the award was made up at the time, Chy set it aside. 2 Barnadiston 463

Another case where the arbitrators were upright men, but they had an interest in the award as one of the parties owed them. But altho they acted uprightly, yet there was no doubt on principle of Policy if the award was in favor of the party who owed them, they would set it aside. Not on the grounds of any corruption in the men, but on a motive of Policy, to exclude persons interested from sitting as arbitrators. 2 Vern 151.

Another case. One of the parties may so conduct himself that a Ct of Chy will set aside an award in his favor. When the parties come before the Arbitrators they must disclose the whole. In this case one of the

Defences to Actions on Contracts. Arbitrament & Award.

parties kept back a paper & it was unknown to the Arbitrators at the time, & for y^e Aw^d was made out, one of the Arbitrators said if he had known of this paper, the Aw^d would have been the other way. Chy. set the award aside. If that paper which was kept back w^d have made no difference in the Aw^d, it w^d not have been set aside. 1 Vk 77.

Legal Questions concerning an award are never discussed in a Ct. of Chy. the remedy is at Law. Amb. Rep. 425.

If the Arbitrators had made a mistake in point of Law, or in point of fact, if it appears on the face of the award, Chy will set it aside. & not that Chy will go into every nice distinction & unravel every award. It must appear on y^e face of the Aw^d. 3 Vk 497 2 Vent 151.

Equity & Law together give a compleat remedy when the award is bad for intrinsic or extrinsic circumstances. Reading the Aw^d is sufficient. It will in the two cases, before mentioned, one when the Aw^d requires some precedent act to be done before the party w^d be entitled to a recovery; & the other is when part of the award to be performed by him is void. In both which cases the party must plead performance on his part. To an action on the original claim, a having been awarded upon, a plea of the award is a sufficient bar in all cases where the Plff. has a power to compel y^e Deft. to perform y^e award.

There are cases when a party may plead an Aw^d in Bar to an action on a former liability of his, & yet he not be a party to the submission as Lessee of W. Justices & C. and B. & C. submit this to Arbitrators.

Personal actions on Contracts. Arbitrament & Award.

The award C. his damages for the trespass. Now A. to an action for this trespass may plead made on the submission of A & B &c. And it is even the case where a point in question is submitted, full satisfaction from one of the wrong doers is a bar to an action vs. the others. Mod. 268. Com. Dig. 328 a 32.

It has been said that when there is a submission entered into between the parties, & between the time of submission & the award an action is brought on the original claim, a plea of the submission will be a good temporary bar to the action. There is no authority for this save Cro. Jac. 9. & it seems to me impossible. It is said it was an implied revocation, & if a Bond is given, it is forfeited. Submissions may be revoked, you have already seen, & the party may resort to the original cause of action.

As to the old idea that if the award is not complied with by the day, then you may resort to the original cause of action. That is entirely done away tho' there is no authority, but Keyd. But Keyd's authority on this subject is a good one. Keyd 215.

YALE LAW LIBRARY
DEC 11 1934

REEVE'S

AND GOULD'S

LECTURES

VOL. II.